INTERNATIONAL LAW

Only study guide for
LCP4801

Department of Public, Constitution and International Law

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OVERVIEW

1 WHAT IS INTERNATIONAL LAW ALL ABOUT?

1.1 Welcome to the International Law module: LCP4801

International law is the law between international entities such as states and international organisations. It is not about political argument although, of course, politics do inform the decisions a state takes and its basic approach to the value of international law. While international law principles are at times more pliable than those in a state's internal law, they are still binding legal rules. An action may be politically expedient, but if it runs foul of the binding norms of international law it is legally invalid and as a student of international law, you must be able to explain this. It is our job to make these rules accessible to you, so that as a future legal practitioner, you will be able to advise your clients, formulate legal opinions and present legal arguments in a court of law.

At this early stage, it must be pointed out that in writing a legal opinion, you must be able to:

- identify the issues raised;
- analyse the facts and the applicable legal principles;
- then apply the legal principles to the facts, and support your argument with reference to authority (such as case law, relevant legislative and treaty provisions, and/or opinions expressed in academic writing);
- draw logical conclusions.
- Bear these guidelines in mind whenever you are faced with the task of answering a legal question.

1.2 What do we aim to cover in this course?

Clearly, you cannot learn all of international law in a semester (or in a single lifetime). What we have tried to do is to give you the essential principles which you must know.

This study guide includes general principles and is divided into six learning units covering topics from international law which are particularly relevant to your field of study. In other words, practical aspects which you may need in your working lives.

The course, therefore, consists of the following learning units:

(1) Defining epochs
(2) Statehood and recognition
(3) International law making as an attribute of state sovereignty
(4) The fundamental principles of the international legal order

(5) Maintaining international peace and security: The enforcement of international law
(6) Jurisdiction of states

1.3 What is our approach to the study of international law

Our new outcomes-based approach has the following distinct features:

- The prescribed tutorial material, which consists of the **prescribed textbook**, your **study guide** and **follow-up tutorial letters**.
- **Case law** is referred to in the textbook, guide, and subsequent tutorial letters. You do not need to copy or download any cases, unless we expressly tell you to do so. However, through the use of the prescribed study material, all the case information you need is at your fingertips. Case law is crucial to a proper understanding of the work in that it represents a practical application of the theoretical principles you have studied. Case law, as you will see later, also provides authority for your arguments and legal opinions.
- **Activities** are included in the study guide. These range from the basic where you are required to fill in relevant information, to more advanced analysis and comparison, to complex problem solving. We urge you to actually do the activities. This component is designed to test whether you understand all that you have studied – you become the judge applying the theory you have learned. It also acts as a litmus-test for those aspects of international law that you are having difficulty with and which you will need to revisit.
- Although we provide the support and guidance that is necessary to help you master this module, you are also required to work actively through the prescribed material in order to integrate everything into a coherent whole. You should not approach each learning unit in a vacuum.

1.4 The method followed in each learning unit

You will find that each learning unit follows the following pattern:

1.4.1 Learning outcomes

The outcomes, as end-products of learning, tell you what you will know and be able to do after you have worked your way through the prescribed material in a learning unit. The outcomes are designed to guide you through the work in a much more focussed and methodical way. They also highlight the areas on which you should concentrate. You can assess how much you have absorbed by testing how well you are able to meet the listed outcomes. The outcomes may require you to explain, discuss, list, argue, comment or analyse a point involving key principles or concepts of international law. However, the acquisition of knowledge is of no real use unless you know what to do with it. By this we mean that you must understand and learn to use the knowledge that you acquire in this module in your everyday life. Then only can you make the study of international law meaningful.

1.4.2 Prescribed or recommended material

The prescribed textbook for this module is Strydom, H (2016) (ed) *International Law* (Oxford University Press). This will be your main prescribed source, and this study guide is designed as a wrap-around the textbook.

Some learning units may contain further **prescribed materials** (such as treaties, case law or journal articles).

These materials may be downloaded from the library e-reserves as indicated in Tutorial Letter 101.

Some learning units may contain **recommended** materials. These materials are not prescribed, and need not be studied for examination purposes, but you may consult them if you wish to learn more, or if you would like to get more clarity on a certain issue.

Some of the above-mentioned recommended materials, may be uploaded under **Additional Resources** on myUnisa.

Therefore, please visit the myUNISA site regularly in order to check for updates.

1.4.3 Theoretical framework and principles

This part makes up the body of the learning unit, and in it you will find a discussion of the core principles and concepts relating to the study of international law. As stated above, your main prescribed source is your textbook (hereinafter referred to as 'Strydom') and this guide is designed to help you find your way through the prescribed chapters in Strydom. Some of the more complex topics, which require explanation over and above the one provided in your textbook, will include our own elaboration and discussion. Reference will be made to the relevant provisions of international law, the Constitution, any legislation, case law and academic writing that will contribute to your understanding of the module. In essence, this part of the study guide systematises the **theoretical knowledge** and **practical application** of the content of international law. It is then up to you to internalise this knowledge to achieve a proper understanding of the topic concerned.

1.4.4 Self-assessment questions, activities, and feedback

The activities and self-assessment questions are intended to test your application of international law principles to concrete situations that may arise in everyday life.

You will find that we have incorporated a number of **activities** in each of the learning units. They are designed to test your understanding of the principles and concepts of international law.

You will receive feedback immediately after each activity. This feedback will not consist of model answers, but guidelines on how to answer the activity questions. Although it may be tempting for you to read our feedback before you have attempted to complete the activities on your own, we urge you to resist such a temptation: The feedback will assist you in assessing whether you have correctly understood and interpreted the relevant

principles of international law. That is why it is important that you should first try and answer these questions yourselves.

If your answers differ markedly from our feedback, it is a sign that you must revisit these sections of the work. It may also be time to contact us.

We will not provide feedback in the guide on **the self-assessment questions** (which are included at the *end* of each learning unit).

However, if you are unsure of your answers to some of these questions, please feel free to contact us, and please check the module site on myUnisa regularly – those questions may also be discussed there.

1.5 How to use the prescribed study material?

The purpose of the study guide is to guide you through the work. However, much depends on the way that you approach your studies. You must remember that you cannot study each unit in a vacuum and you need to be able to integrate all the prescribed material.

We suggest that you approach your studies in the following way:

- Basic as it may appear, you must actually have a copy of the textbook, guide, tutorial letters and any further prescribed study material.
- Start studying immediately! You have **only one semester** in which to master the tutorial material and acquire the skills, critical ability and understanding that we expect of you.
- Start each learning unit by reading the outcomes set out at the beginning so that you know where you are going and what you will be able to do when you get there. If you do not understand some of them, do not be concerned. The content (knowledge) and activities that you will be working through will enable you to achieve even the more difficult outcomes.
- Integrate the information found in this study guide under each learning unit with the information which appears in the textbook, subsequent tutorial letters, and myUnisa. Your notes could include an explanation of difficult international law concepts, reference to specific provisions of international law, the Constitution, commentaries and reference to case law. Integrate the notes in such a way that you understand the theory and the practical application of the material.
- After you have mastered the material in each learning unit, do the self-assessment questions. They will enable you to evaluate your progress. They will also help you achieve the specified outcomes and assist you in identifying any difficulties you may be experiencing with a particular aspect of the work. You will not be provided with feedback for these self-assessment questions, although you are welcome to contact your lecturers, should you be uncertain of your answers.
- Test your answers against the answers that we have provided. If there is a vast difference between your answers and ours, contact us so that we can address your problems at an early stage in your studies. Remember that the activities are similar to (but not necessarily the same as) the questions set in the examination. If you are able to complete them honestly and (eventually) without consulting your textbook, guide and tutorial letters, you will be ready to face the examination and should have no trouble

answering the questions we ask and achieving the outcomes set at the beginning of each learning unit.

- Please contact us if you come across tutorial material that is unclear, ambiguous or just student-unfriendly. This will enable us to clarify any difficulties that you are experiencing with this module and also to improve the quality of the tutorial material.

THE ICONS FOR ACTIVITIES USED IN YOUR STUDY MATERIAL

Each learning unit contains various activities that you should perform. For example, the study activities will refer you to the study material in the study guide and tutorial letters that you are required to study; the doing and thinking activities require you to perform certain actions and to answer certain questions.

Icon	Description
	Learning outcomes: The learning outcomes indicate what parts of the topic or learning units you must master and demonstrate that you have mastered.
	Study: The study icon indicates which sections of the prescribed book or the study guide you need to study and internalise.
	Activity: The activity icon refers to activities that you must do to develop a deeper understanding of the study material.
	Self-assessment: When you see the self-assessment icon, you will be required to test your knowledge, understanding and application of the material that you have just studied.
	Feedback: The feedback icon indicates that you will receive feedback on your answers to the self-assessment activities.
	Prescribed study material: You will find prescribed study material related to this module.
	Frequently asked questions: Questions frequently asked by students will be posted on myUnisa.

Learning unit 1

Defining epochs

In this learning unit we consider the following:

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Learning outcomes

Having completed this learning unit, you must be able to do the following:

- Describe the development of international law, and also the contributions of pre-colonial African entities to such development;
- Explain the history behind the emergence of the modern state system;
- Explain and analyse the role of international organisations in international law;
- List and explain the differences between national law and public international law;
- Explain the significance of the Westphalian system.
- Define the term ' public international law'

Prescribed study material

- Strydom (ed) *International Law* Chapter 1 pp 3–33.
- Elias *Africa and the Development of International Law* 3–33
- Smith "Peace and Palaver: International Relations in Pre-colonial West Africa" 599–621

1.1 INTRODUCTION

The term "epochs" refers to a particular point/period in history. With this in mind, chapter 1 of the textbook explains certain periods in history that have had an impact on the formation of independent states and the interaction between these states. By analysing the different time periods that have had an effect on the development of international law, this chapter enlightens you as to how modern day international law is able to provide justifiable and rational solutions to international disputes. Additionally, this learning unit

will also provide a generally accepted definition of international law, and explain the differences between national and international law (which will not be found in chapter 1 of Strydom) and should be studied as it is found in this learning unit.

1.2 DEFINITION OF INTERNATIONAL LAW

It is often easier to understand a definition only once more light has been cast on the subject matter. For this reason, the discussion below seeks to give you a general definition of international law with the hope that you will keep this in mind throughout the remainder of the learning unit.

In broad terms, international law is the law between states (countries). In other words, international law regulates the external relations between states.

Therefore, states are the subjects of international law and the relations they have with each other may either be bilateral (one state to another) or multilateral (several states cooperating with one another, or as a member of an international organisation).

The above indicates that private individuals are generally not subjects of international law and it is important to keep both this and the definition above in mind when dealing with the subsequent sections in this learning unit.

1.3 HISTORY OF INTERNATIONAL LAW

Although certain aspects of what we today regard as international law are as old as history itself, international law as we know it today is relatively new (only some 400 to 500 years old). It is also important to note the extent to which colonialism played an important role in elimating contributions of pre-colonial African kingdoms to the practice of international law. As Elias noted, modern day international law has its roots in European common law, ignoring the extent to which African customary law informed interactions between pre-colonial African kingdoms and other European actors (see Smith p 599).

Whilst reading the historical context contained in the first chapter of Strydom, it will be important to keep asking yourself the following questions: why did modern international law develop? What necessitated cooperation between states and why did states decide to cooperate?

The history of international law given in Strydom encompasses four distinct time periods:

- The period from 1500 to 1648;
- The period from 1648 to 1815;
- The period from 1815 to 1914; and
- The World Wars and thereafter.

The discussion of these time periods can be lengthy but are very relevant in giving you an understanding into the development of a modern state system – a system which is largely in place even today. It is particularly important to include pre-colonial interactions between African kingdoms *inter se* and European actors from the 6th Century to the

1500s (Elias pp 6–15; Smith pp 599-621). Elais (pp 6–15) gave examples of interactions between Mansa Musa of the Kingdom of Mali and Kingdoms in Arabia, the embassy of two envoys to Lisbon in 1514 sent by Oba of Benin Kingdom, and embassies from Portugal to Mossi and Congo. These developments were halted by the submergence of old African Kingdoms under colonial powers, and the process of of relegating Africa to a mere object of international law began (Elias, pp 18–19). Each period should be briefly summed up with the intention of knowing what (generally) took place and how these events impacted the contemporary relationships between states. The influence of the period ending in 1648, specifically the Westphalian system or model which is described in detail (see Strydom pp 8–10), needs to be examined carefully. The Westphalian model refers to:

> An international order consisting mainly or exclusively of independent sovereign States… which exercised untrammeled authority within their respective territories and freely coo-ordinated their mutual relations in accordance with their perceived self-interest on the basis of equality.

The sovereign equality of states and the idea that all states are equal and entitled to the same respect are today still part of the central ideology of international law. Based on the above extract and the discussion in Strydom, what is the significance of the Westphalian system? How has it shaped modern international law?

The historical discussion in Strydom should make it clear that international law is a law of intellectual flow. It reflects the major ideological trends as they sweep through the world – each period sees the emergence of new and more complex subjects. Some of these trends can be summarised as follows:

- The idea of international law as a law solely between states is linked to state sovereignty and remains the dominant theme of international law.
- The idea of the international organisation as an entity distinct from its member states developed in response to the need to regulate issues affecting states as part of a world community and to place some limits on the potential for conflict inherent in a purely self-serving state sovereignty (see section 5 of this learning unit for more detail in this regard).
- The idea of the individual as a "quasi-subject" of international law developed as a result of the atrocities of two world wars, the emancipation of colonial territories and the desire of the individual for acknowledgment of his/her human rights and their right to self-determination.

We have certainly not seen the end of the development of international law. The modern international community faces new challenges in many areas: terrorism, human rights, international criminal law and climate change. These are a few of the areas where international law has a role to play and international law will continue to develop in order to provide possible solutions to all these problems.

1.4 LEGAL NATURE OF INTERNATIONAL LAW

This section is not specifically dealt with in chapter 1 of the textbook and the information contained in this section should be thoroughly studied, and supplemented with questions (directed at the lecturers) should you require clarification or if something is not understood.

1.4.1 Differences between international law and national law

Insofar as differences between international and national law is concerned, it is important that you understand and refer to your Constitutional Law guides in order to ensure that you know what and how the legislature, executive and judiciary operate nationally. The following table provides a skeleton of the differences between the two branches of law. It is imperative that you think about each point and understand how they differ. After you have been through the table, the next section will provide an example (by referring to the United Nations) in an attempt to illustrate the differences between international and national law.

International Law	**National Law**
There is no legislator in international law	Complete legislative process (think parliament)
Has a judiciary but: (i) There is no precedent system (ii) The state is a judge in its own case	Fully developed judiciary (i) Precedent system applies (ii) *Nemo iudex in sua causa*
There is no executive to enforce judgements – sanctions are poorly developed	There is a complete executive machinery in order to enforce judgments
The subjects of international law are generally states or international organisations	The subjects of national law are individuals or legal persons

1.4.2 The United Nations

This is a brief introduction to the United Nations (UN) and how it operates. You will be dealing with the UN in detail in later learning units, but what follows are the bare essentials of how things work internationally.

(1) Why is the UN not a legislator? How does it differ from a parliament?

The UN does not have the power to enact rules which are binding on all states. The General Assembly (GA) may only adopt resolutions, and these are merely recommendations – states cannot be compelled to apply them. A parliament (as an instrument of national law), on the other hand, makes laws which are fully binding on the community it represents.

In the UN, the representatives of states are not elected to the GA, but are appointed by their respective states, as opposed to a democratic parliament where the members are elected by the citizens of that specific state. Unlike the GA, the Security Council (SC) of the UN is entitled to give binding decisions however, these decisions are restricted to situations determined by the SC as constituting a threat to international peace and security.

(2) The national law precedent system v the International Court of Justice (ICJ). Does the ICJ follow a precedent system?

Under the precedent system, lower courts are bound by the decisions of higher courts. This is the position under most, if not all, national law systems. However, the position is somewhat different under international law.

Article 59 of the Statute of the ICJ provides that the "decision of the Court has no binding force except between the parties and in respect of that particular case". Therefore, international law excludes the precedent system on two fronts:

- The decision applies only to the parties involved: in other words, if the same issues arise between different parties, the court is not bound to give the same ruling; and
- The decision applies only in that specific case.

(3) Why do we say that the state judges its own case? On what basis are the judges in the ICJ appointed for a specific case? How does such appointment differ from that in respect of the judges in a national case?

In international law, the state itself decides whether there has been an infringement of international law, judges the matter itself, and takes whatever steps it decides on. States are also closely involved in the process of appointing the panel (the judges) that will hear their case. They can either elect their own representatives to the panel or they can at least elect people who will be sympathetic to their cause. It is in this sense that states are "judges" in their own case. Conversely, in national law, the legal principle *nemo iudex in sua causa* applies which literally means that no-one should be a judge in his own case. The plaintiffs or accused have no say in who will hear their cases – there is a permanent body of judges, magistrates, etcetera, who hear all cases.

(4) Explain the difference between the executive ''machinery'' backing up national judgments and that backing up international law judgments?

Municipal judgments are supported by the complete executive machinery of the state in the form of a police force, the military etc. In international law, there is no central executive authority with a police force at its disposal to enforce judgments. At the international level, the SC is entitled to make use of ''sanctions'' that can be brought against offending states. Chapter VII of the UN Charter allows the SC to direct its members, either individually or collectively, to use force against a state whose violation of international law constitutes a threat to international peace and security. The SC can also make use of economic sanctions against an offending state.

Having considered the differences above, the next section will discuss the similarities between international and national law.

1.4.3 Similarities between international law and national law

International Law	National Law
Comprises accepted norms prescribing state behaviour	Comprises accepted norms prescribing behaviour
Uses writings, etc. of jurists rather than morality	Writings of jurists and precedent are freely used
Can consciously be altered by treaty	Can consciously be altered by statute/ legislation

The similarities are fairly self-explanatory. That said, should anything not be understood, you are urged to contact your lecturers for clarification.

International law is often termed as "weak" law due to the fact that there are certain weaknesses in the system when compared with national law – international rules are often difficult to identify and their observance appears arbitrary.

However, international law is still closer to national law than to any social or moral norm system applying in a specific community. Do you not think that the term "incomplete" would better describe these characteristics? Perhaps international law should rather be described as an incomplete system rather than a weak system? Either way, it is essential to remember that modern international law remains a legal system that is binding on the parties to an international agreement.

1.5 THE RISE OF INTERNATIONAL ORGANISATIONS

The complexity of issues that are emerging in international law as well as the changing nature of international society has resulted in an increase in what are commonly referred to as international organisations.

In terms of the *Reparations for Injuries Suffered in the Service of the United Nations Case* (1949 ICJ Rep 174), the ICJ made it clear that, like a state, an international organisation is a subject of public international law.

Perhaps the most common example of an international organisation is the European Union or the African Union. The members of these organisations are states and not private enterprises or individuals. Therefore, it is important to note that ordinarily, members of international organisations are states and this makes such organisations unique and different from private international unions or, their modern counterparts, non-governmental organisations (NGOs) whose members are private organisations/ enterprises or private individuals.

Strydom (pp 25–31) sets out to discuss the proliferation and nature of international organisations over the last two centuries. In this discussion, you should ask yourself: Why has there been a proliferation in international organisations? For some scholars, this proliferation is part of the progressive development of international law and is a necessary step for the ongoing transformation of international law. Do you agree with

such scholars? Could there be any negative consequences to having several international organisations trying to regulate the same areas of international law? In this regard, think about several developing states trying to regulate fishing or deep-sea mining versus several developed states trying to regulate the same areas. Developing and developed states often have different objectives for regulation but the question remains whether collective regulation will be beneficial to all states involved.

Such questions should be kept in mind when working through the discussion in Strydom.

Self-assessment

(1) Write an essay in which you define international law and thereafter compare national law to international law.
(2) Write an essay about the practice of international law in pre-colonial Africa.

Learning unit 2

Statehood and recognition

In this learning unit we consider the following:

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2.2.1 Categories of international legal subjects 9
2.2.1.1 Original (primary) subjects 9
2.2.1.2 Derivative (secondary) subjects 9
2.2 Introduction to statehood 10
2.3 Statehood, recognition, and decolonisation 13
2.4 Statehood and membership of the United Nations 15
Self-assessment 17

Learning outcomes

Having completed this learning unit, you should be able to:

- define the terms "international legal subject" and "international legal personality";
- distinguish between primary and secondary international legal subjects;
- recognise which entities may qualify as subjects of international law;
- identify the marks of statehood;
- apply these characteristics to a practical situation;
- explain and assess the differences between the two theories governing the role of recognition of states within the question of statehood;
- analyse the effect of the principle of self-determination and the process of decolonisation on the theories of statehood;
- discuss the United Nations organisation as a subject of international law;
- explain the requirements and processes prescribed by in the United Nations Charter relating to the membership, suspension and expulsion from the United Nations.

Prescribed study material

- Strydom (ed) *International Law* Chapter 2 pp 35–62.
- Charter of the United Nations, 1945

2.1 GENERAL REMARKS

Study

- You should study the discussion provided below, before you proceed to study Strydom, Chapter 2.

This learning unit aims to introduce you to the concept of international legal personality in general, and statehood in particular. Why is this concept important, you may ask? Well, the International Court of Justice explained it succinctly in *Reparations for Injuries Suffered in the Service of the United Nations* (1949 ICJ Rep): an entity which is endowed with international legal personality is an international law subject and as such it is 'capable of possessing international rights and duties, and has the capacity to maintain its rights by bringing international claims'.

States remain the original, or primary subjects of international law. There are however others – such as international organisations, belligerents, even the individual, which may enjoy some degree of international legal personality. Therefore, having completed this learning unit you will be able to identify which entities qualify as subjects of international law and are able to act independently on the international plane, *i.e.* which entities are able to acquire rights and incur obligations under international law.

We will also be dealing with another important issue: we will define the extent of each legal subject's international legal personality. It is important to know this, because not all legal subjects have the same capacities to act on the international plane. The content of their capacities is determined by the extent of international legal personality they posses. Alternately, if you are given the extent of the capacity of a certain entity, you should be able to say what it is or is not.

But before we go further, we must make one important distinction: that between 'original' and 'derivative' international law subjects.

2.1.1 Categories of international legal subjects

2.1.1.1 Original (primary) subjects

An original subject is one which has its international legal personality simply by virtue of its existence. The state is the original, primary and principal 'person' of international law. If an entity meets all the requirements necessary for statehood (discussed below), it will automatically have international legal personality.

2.1.1.2 Derivative (secondary) subjects

These subjects have international legal personality only if and to the extent that the primary subjects have conferred it on them. Their mere existence does not guarantee them international legal personality. An example of a derivative, or secondary, subject is an international organisation. The latter is created by an agreement between its members (states). The extent of its legal personality is limited to those powers and duties for which the states that made it, provide. It is, therefore, more limited than that of states.

2.2 INTRODUCTION TO STATEHOOD

Study

- Study Strydom, Chapter 2, pp 36–42

A state, as explained above, is a primary subject of international law and there are a number of characteristics, which must be present, before an entity will be considered to have become a state. There are four such characteristics listed in the 1933 Montevideo Convention on the Rights and Duties of States:

- A permanent population
- A defined territory
- Government and
- Capacity to enter into relations with other states.

Strydom discusses these characteristics, and also observes that there is an important debate about statehood: namely, how states come into existence, or are created. Is the objective application of the abovementioned characteristics enough, or can one argue that states are created solely through the recognition by other states. Herein lies the main distinction between the declarative theory of statehood and the constitutive theory of statehood.

Proponents of the constitutive theory maintain that the act of recognition is a requirement for the creation of international legal personality. This theory, however, is not without its shortcomings. First, it is not clear what the position of unrecognised entities would be – could they behave as they choose, without observance of the international legal order? What if an entity is recognised by some states only?

To counter this, therefore, proponents of the declaratory theory advocate that the act of recognition is not a requirement for statehood, and that such an act merely acknowledges an existing state of affairs. In other words, statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled.

Followers of this school of thought (such as Lauterpacht) would therefore also point out that there is a legal duty on other states to recognise an entity which complies with the Montevideo requirements (unless that entity had come into existence after having violated a rule of international law).

The reality, of course, is that although states do take into account whether the other four factual requirements have been met, the decision to recognise may be motivated by political ideology. This may prompt a state to recognise an entity prematurely, or to deny it recognition.

As to which is the 'better' theory was considered by a South African court in the case of *S v Banda* 1989 4 SA 519 (Bop). The court had to decide whether Bophuthatswana qualified as a state under international law or not, which would have been relevant to the accused's charge of treason which, as you know, can only be committed against a state. The court considered both the constitutive and the declaratory theories. It came to the conclusion

that the declaratory theory was the more acceptable one. It was found to be preferable, because it was objective, and it took into account only those four requirements, which are based on well-established rules of international law.

The court criticised the constitutive theory for being arbitrarily applied and politically based. It was found to make allowance for political, ideological and economic motives behind the act of recognition. Because it was ridden with so many variables, and was so subjective, it was considered an unsuitable theory to use in the determination of the existence of a legal entity.

Other academics, such as Dugard, however, have pointed out that one cannot completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations (or at least practically to demonstrate such a capacity) depends on it.

In a final analysis, Strydom *et al* choose to treat the characteristics of statehood found in the Montevideo Convention as 'marks' of statehood, which describe what states should broadly look like and "not to prescribe what a state must be in order to be recognised as such (that is, not as *criteria* for statehood").

Activity 2.1

Study the characteristics of statehood listed in the Montevideo Convention and discussed by Strydom, and try to answer the following question:

State A is a new state created by the legislative act of its mother state, B. State A is very poor. Its population is largely nomadic, in addition to which some 60% of its adult males are forced by economic necessity to seek employment on the mines in the former mother state. The remainder of the population live in organised tribes under a patriarchal leader along strict hierarchic lines.

The borders of State A have not yet been fully defined since negotiations are still taking place between it and its mother state for the extension of its territory.

One of the territories that currently falls within A is a small enclave completely separated from the main body of its territory. The enclave contains only a fishing town with a canning factory, a school, a magistrate's court and certain government offices manned partly by officials seconded from State B and partly by local inhabitants of State A who are receiving training from B's officials.

Because the government of State A is virtually bankrupt, it relies heavily on financial assistance from State B. It is, however, actively developing a form of government totally alien to that of B. Although A's Minister of Foreign Affairs has travelled extensively in an attempt to establish diplomatic relations in Europe, no country other than B and a few neighbouring states that are wholly dependent on A for a route to the sea, have recognised A. A's application for membership of the UN has also been refused.

Discuss fully whether A is a state enjoying international legal personality (statehood).

Feedback

A was created by mother state B:

It is a perfectly acceptable process in international law for one state to hand over part of its territory to another state or, as in the present case, to create a new state in this way. In terms of the Western Sahara case 1975 ICJ Rep, the fact that State A's population is nomadic does not exclude statehood, provided there is an organised society. The further fact that a large percentage of the population consists of migrant labourers (although different from a nomadic population) does not change the position. The added fact of a strictly organised society lends further credence to accepting the statehood of A. At first glance, then, A could qualify as a legitimate, independent state. Keep the fact that it is very poor in mind and see if it has any role to play.

A's borders are not fully defined:

Clearly defined borders are not a prerequisite for statehood. Israel's borders have been disputed for a very long time and even South Africa's borders with, for example, Swaziland, are the subject of debate. See also the remarks of the court in the North Sea Continental Shelf case, as discussed by Strydom et al.

A has a small enclave separate from the main territory:

This, too, is not a bar to statehood. Think of Alaska, which is separated from the USA by Canada.

Permanent population:

A nomadic population is not a bar to statehood. In the Western Sahara case the court found that the fact that the population is nomadic does not exclude statehood. Rather than looking at the situation of the population in a specific place, one should consider whether the population lives in accordance with an organised, recognisable social and political structure. If it does the population requirement has been met.

The important point is that the population must have some sort of relationship to the would-be state. See the remarks of Craven and Abbas in this regard, as discussed by Strydom.

Effective government:

The question is whether there is 'a system of government in general control of its territory to the exclusion of other entities'. In the present example, A has its own executive organs (there is a reference to a Minister of Foreign Affairs), although it is not entirely successful in conducting foreign relations through them. It would also appear to have an independent legal system and its own courts.

Financial dependence:

You will remember that we told you at the outset to bear A's financial position in mind. Here, again, it is a matter of degree. If it can be said that the dependence is so complete that B, in fact, dictates A's policies, then it is relevant. If A is still able to act independently of B (as would appear to be the case here since it is 'developing a form of government totally alien to that of A'), financial dependence alone will not preclude statehood.

Capacity to enter into relations with other states:

This particular characteristic seems to be problematic for A. Please bear these facts in mind and return to this activity after you have completed this learning unit.

The actual conclusion you reach is not crucial; you can argue either way. Depending on how you interpret the facts, A is financially dependent on B; it does not enjoy any independent recognition, save from other states dependent on B, and cannot conduct foreign affairs without this recognition; and its application for UN membership was refused. On the other hand, its financial dependence does not seem to influence its policy, it is recognised by some states (even if this is a form of 'forced recognition', which should be seen as acceptance of the inevitable rather than approval), etcetera.

2.3 STATEHOOD, RECOGNITION, AND DECOLONISATION

Study

- Study Strydom Chapter 2 pp 42–55

We have touched upon the differences between the declaratory and constitutive theories, and in this section of the work, Strydom *et al* discuss the two in more detail. As stated above, in terms of the declaratory theory, a state is created in international law when it meets the criteria for statehood, as contained in the Montevideo Convention (and thus, the act of recognition by other states simply declares an existing state of affairs and it is not legally relevant). In terms of the constitutive theory, the act of recognition is a high political act, which constitutes the state.

This dichotomy between law and fact has been the subject of a number of academic debates, and you should familiarise yourself with them.

Activity 2.2

Write an essay in which you describe and evaluate the declaratory and constitutive theories of statehood, by referring to the development of each theory, as well as case law and existing academic opinion on the subject.

Guidelines:

- Define each theory, and distinguish between the two theories;
- Discuss the opinions of Crawford and Chen and explain whether the creation of a state is a mixed question of law and fact, or not;
- Explain the practical problems associated with the constitutive theory;
- Explain the problems, which the declaratory theory brings about. Pay careful attention to the question of 'who or what decides when these [the creteria for statehood] are met';
- You can also make reference to *S v Banda* which we discussed at the start of this learning unit.
- Discuss the theories of scholars, who have tried to find a 'middle way';

- Discuss the emergence of the modern state in Europe and the subsequent wave of colonisation, when the constitutive theory became dominant. Pay attention to Wheaten's argument that 'while the "internal sovereignty of a state" did not "depend on its recognition by other states", a state's "external sovereignty" would "require recognition by other states in order to render it perfect and complete";
- Reflect on the political convenience of the constitutive theory, which enabled the exercise of sovereignty by imperial European states;
- Describe the emergence of the declaratory theory at the end of World War I and the reasons therefor.

At the end of World War II, the world saw the establishment of the United Nations, and its charter recognised, amongst others, the principle of self-detrmination. In 1960 the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, followed by Resolution 1541, which paved the way for the process of decolonisation of African States. These acts of self-determination took place within existing colonial boundaries, because of the principle of *uti possidetis*. In terms of the latter, colonial boundaries, however arbitrary they may be, must be respected. The reason for the rule is purely practical: if all states were now able to question their boundaries, the world – and Africa in particular – would be plunged into chaos (or greater chaos).

Of course, this rule is not really fair and it can be said that it conflicts with the right of peoples to self-determination. This was acknowledged in the *Frontier Dispute* case 1986 ICJ Rep 554 where, in a dispute between Mali and Burkina Faso, the court stated that *uti possidetis* 'freezes the territorial title' and allows self-determination only within the borders defined by the former colonial powers.

Activity 2.3

Explain whether the principle of self-determination and the process of decolonisation has had an impact on the declaratory and constitutive theories of stathood.

Guidelines:

- In order to answer this question, you must study pages 49–53 of Strydom carefully and in detail.
- Focus on the fact that the decolonisation process proved challenging to the propponents of both the decalaratory and constitutive theorists: In the case of the former – where the 'creteria' of statehood could not be fully met, and in the case of the latter – where political discretion could not be reconciled with the 'peremptory nature of self-determination'.

The tension between the issues of statehood, self-determination and recognition were also brought into focus more recently, with the secession of a number of states in Eastern Europe. Please make sure that you study pages 53–55 in Strydom and understand the difference between Kosovo's declaration of independence (and the ICJ's confirmation in its Advisory Opinion that the declaration itself was not contrary to international law, even though the court did not discuss its statehood status), and the secession of the

Republic of Crimea from the Ukraine (and Crimea's subsequent accession to the Russian Federation). In the case of Kosovo, it has been argued that its statehood stems from the application of the principles of self-determination and remedial secession. The legality of Crimea's secession and accession, however, remain doubtful, regardless of which theory of statehood one ventures to apply.

2.4 STATEHOOD AND MEMBERSHIP OF THE UNITED NATIONS

Study

- Study Strydom, Chapter 2, pp 56–62

Before we delve into the question of membership of the United Nations, it is important to make some preliminary remarks.

As we mentioned at the beginning, there are international law subjects other than the state. These too have international legal personality, although not as extensive as that of states. That is because an international organisation is created by and made up of states (or other international organisations), and its international legal personality depends on its creators' discretion. These organisations are limited by their respective constituent charters (the agreements establishing them).

Slomanson defines an international organisation as follows:

> [A] formal institution, established by agreement of the affiliated members who created it. The common feature of most [international organisations] is that their members all benefit from an organization working toward their desired objectives.

International organisations must be distinguished from non-governmental organisations (such as Amnesty international), which do not depend on any state for their existence and whose membership is not limited to states.

An international organisation must be created by virtue of an international agreement among states.

International organisations may be universal, such as the United Nations, or regional, such as the European Union, or the Southern African Development Community.

From a legal point of view there is no difference between a universal and a regional international organisation. The mere fact that the UN operates on a global level does not mean that its resolutions are more important to its members, than those of the other regional organisations of which they are members. Ideally, however, there should be no irreconcilable conflict between such resolutions.

Even though international organisations do not have a capacity as extensivel as that of states, they can act independently (in fact they should have been created to act independently from any state sovereign power) on the international plane. This was confirmed by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* 1949

ICJ Rep. In this case the ICJ was asked to find whether the UN could exercise diplomatic protection over its agents and also institute action on their behalf for injuries suffered in the course of their duties. The exercise of diplomatic protection and the institution of a claim for harm to a national are both capacities, which typically accrue to a state. By finding that the UN could in fact do both, the ICJ recognised that it was a subject of international law enjoying international legal personality.

The extent of international legal personality enjoyed by international organisations differs. The powers of any given organisation depends on the purpose for which it was created and the functions and powers which it has been given. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* ICJ Rep 1996 , the court remarked that:

> [I]nternational organisations are subject to international law [and] do not, unlike States, possess a general competence. International organisations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.

As stated above, what an international organisation may or may not do is set out in its founding document, or constituent charter, and may be further developed by practice.

The one feature that will always be common to all international organisations is the fact that their members are states or other international organisations made up of states. The original members will be those who signed the founding document. Usually this document contains provisions governing later admission to the organisation, which is subject to certain requirements for membership and the affirmative vote of the majority of members. If a member state grants independence to part of its territory, the new state will have to apply to become a member of the organisation, and for that reason it will have to comply with the requirements set for membership. It will not, therefore, automatically succeed to the mother state's membership.

As mentioned above, the United Nations is the quintessential international organisation, and the question of membership thereto will become our focus here. The United Nations succeeded the League of Nations which was created in 1917 with the dream of maintaining international peace and security. It, however, failed: the withdrawal of many of its existing members, the offensive military objectives pursued by many of them (think of USSR, Germany and Japan), the1930s economic depression, and of course – the outbreak of World War II – all spelled disaster for the League.

In 1942, towards the end of the Second World War, the members of the League decided to replace it with another international organisation – the United Nations.

Its Charter was drawn by fifty states during a conference held in San Francisco (April-June 1945), and the UN came officially to life in October 1945.

The main purpose of the United Nations is to maintain international peace and security. It does this through its principal organs, which are: The General Assembly (GA); The Security Council (SC); The Economic and Social Council; The Trusteeship Council; The Secretariat; and The International Court of Justice (ICJ). The primary organ charged with maintaining

peace and security is the Security Council, and it will be discussed in subsequent learning units.

The membership of the United Nations is regulated by article 4 of the UN Charter. Please make sure that you are familiar with its contents. In this regard, please note that 'peace-loving states' are understood to be states which respect the rights of other states and settle their disputes by peaceful means. Secondly, bear in mind that the state applying for membership must accept all the obligations imposed by the Charter.

From a procedural point of view, the applicant state must have been recommended for membership by the Security Council (nine out of fifteen affirmative votes are required), after which the General Assembly decides on admission, which requires a two-thirds majority of those members who are present and voting.

On the other hand, suspension of membership is governed by Article 5 of the UN Charter, and expulsion: by article 6. Please note that the UN Charter is prescribed study material, therefore its provisions must be studied carefully alongside Strydom's discussion on pages 61–62 of the textbook.

Self-assessment

(1) *Prior the official establishment of the various entities within Former Yugolsavia's territory, the Serbs in Bosnia controlled an area which they called 'Republica Srpska'. They proceeded to drive out Muslims and Croats and make 'Republica Srpska' a 'purely' Serbian entity within Bosnian territory. Republica Srpska was alleged to be in control of a defined territory, a permanent population, to have its own currency, and to even have concluded international agreements. If this case had come before you as a judge, would you have concluded that Republica Srpska was a state, or not? Substantiate your answer.*

(2) *In November 2012, the United Nations General Assembly passed a resolution changing the status of Palestine from an "observer entity" to a "non-member observer state" within the United Nations system. Susan Rice (the U.S. Ambassador to the U.N.) told the Assembly: "This resolution does not establish that Palestine is a state." You have been tasked by the South African government to write a legal opinion on whether or not Palestine has become an independent state in light of the requirements for statehood in international law.*

Learning unit 3

International law making as an attribute of state sovereignty

in this learning unit we consider the following:

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Learning outcomes

- explain what is meant by the sources of international law;
- provide an African perspective of the sources of international law;
- discuss, in general terms, the provisions of article 38 of the Statute of the International Court of Justice;
- evaluate the relevant importance of the different sources you have identified;
- provide the definition of a treaty;
- discuss the various provisions of the Vienna Convention on the Law of Treaties impacting on the definition of a treaty;
- distinguish the various types of treaties;
- explain the requirements for the conclusion of treaties;

- apply the provisions of the Vienna Convention on the Law of Treaties governing the competence to conclude a treaty;
- explain the difference between ratification and accession in the conclusion of treaties;
- identify the factors making a treaty void or voidable and apply these to practical situations;
- explain when a treaty can be terminated, again with reference to practical examples;
- discuss the consequences of reservations to the operation of treaties;
- define customary international law;
- list the elements of customary international law;
- discuss *usus* as an element of customary international law;
- discuss *opinio iuris* as an element of customary international law;
- determine the existence of a rule of customary international law by applying the elements of customary international law;
- explain general principles of law as a source of international law;
- provide some examples of concepts that have been accepted as general principles;
- discuss the role of judicial decisions as a source of international law;
- discuss the role of writers as a source of international law;
- explain the various qualifiers attached to the use of judicial decisions and writers by article 38(d) of the Statute;
- discuss sources of international law emanating from international organisations;
- discuss codification of international law;
- define *ius cogens;*
- distinguish *ius cogens* from customary international law.
- distinguish between direct and indirect application of international law in the context of South African municipal law;
- identify relevant provisions of the Constitution relating to the direct and indirect application of international law;
- analyse ss 39 and 233 of the Constitution and relate them to the use of international law for the purpose of interpreting national law;
- analyse ss 231 and 232 of the Constitution and relate them to treaties and custom respectively

Prescribed study material

- Strydom (ed) *International Law* Chapter 3 pp 63–104.
- Vienna Convention on the Law of Treaties, 1969

3.1 INTRODUCTION TO THE SOURCES OF INTERNATIONAL LAW

Study

- Study Strydom, Chapter 3, pp 64–68

In the first two learning units, we learnt how states are formed and how international law developed and continues to develop – this means that thus far we have focussed on the

subjects of the international legal system. This does not necessarily tell us much about the rules of the system and where they come from. Therefore, the following learning unit will concentrate on both the creation of, and the sources that govern, international law.

As pointed out in Strydom, a good starting point is the fact that article 2(7) of the United Nations Charter mandates that nothing 'shall authorize the United Nations [and any state for that matter] to intervene in matters which are essentially within the domestic jurisdiction of any state'. What does this mean? What does this tell us about the formation of international law? The consequences of this article are that international law can only come about as a result of a state's legal competency to participate in the international arena.

In other words, it must always be borne in mind that international law is based on the consent of its legal subjects (states) and the sources of international law need to reflect this consent. In the discussions that follow, the term 'sources' refers to documents or instruments where a particular international law rule or principle can be found (in this regard, read the bottom of page 65 where Strydom highlights the terms 'convention, statute, protocol, charter and instrument' and their close relationship as international agreements).

3.2 TRADITIONAL SOURCES OF INTERNATIONAL LAW:

The traditional sources of international law are highlighted in article 38 of the Statute of the International Court of Justice. This article provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

An important question to reflect on is whether there is a hierarchy in the sources contained in article 38? The general practice seems to be that there is no strict hierarchy, however how has the codification of international law affected this? Lastly, what could be meant by article 38(1)(c) and the term 'general principles of law'. See the discussion starting on page 66 of Strydom to reflect on and answer some of these important questions.

Given the above, you can now hopefully list the traditional sources of international law and indicate where they are set out. However, in order to apply these sources practically, you need to know the sources more 'intimately'. Therefore, we now turn to a more detailed discussion of each source, namely:

- Treaties;
- Customary international law;
- General principles of law;
- Judicial decisions and the teachings of publicists.

After discussing the traditional sources and focussing on the information provided in the textbook, we will briefly reflect on sources that may fall outside the scope of article 38 as well as obligations *erga omnes* and the principle of *jus cogens*.

Activity 3.1

In the *Lotus case (France v Turkey)* 1927 PCIL Rep Ser A no 10, a French tanker (the Lotus) collided with a Turkish tanker (the Boz-Kourt) on the high seas.

Eight Turkish soldiers were killed. When the Lotus docked at Constantinople, the French officer who was the lookout at the time of the collision was charged with culpable homicide in the Turkish courts. Called upon to decide on the issue of jurisdiction, the Permanent Court of International Justice (PCIJ) held that:

> The rules of international law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.

Using Article 38, can you recognise the two sources of international law identified in this quotation? Under which sections of article 38 of the Statute of the ICJ would you classify each source?

Feedback

Clearly, the court was referring to treaties (conventions), found in article 38(1)(a), and customary international law (usages generally accepted as expressing principles of law), which are provided for in article 38(1)(b).

3.3 TREATIES AS A SOURCE OF INTERNATIONAL LAW

Study

- Study Strydom, Chapter 3, pp 68–89
- Umozurike, "International Law and Colonialism in Africa: A Critique" pp 99–101

Listed in article 38(1)(a) of the ICJ Statute, treaties have been described as being of 'paramount importance to the evolution of international law' and play a fundamental role in the development and codification of international law. International organisations are created, disputes are settled, air and sea transport and trade is regulated, and a wide range of inter-state relations are all fostered by treaties. Generally, treaties are either bilateral or multilateral with the former regulating a matter between two states and the later regulating a matter which impacts and involves multiple states. Can you think of or find examples of both multilateral and bilateral treaties that South Africa is part of?

At this point, it is important to emphasise that treaties form the backbone of modern international law and this section in Strydom should be studied in detail. For this reason, you are urged to keep a copy of the 1969 Vienna Convention on the Law of Treaties close at hand when studying this section since this treaty has often been described as the "bible" regulating international treaties. It must be noted that the principles governing the validity of treaties were ignored by early Europeans in their interactions with African Kings and Chiefs. Some of the agreements were obtained by the use of force or threat of force, deceit or ignorance (Umozurike pp 99–101). Closely related to this treaty is the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations which regulates the relationships between international organisations and/or states. Perhaps it will be helpful to take another look at learning unit one and reacquaint yourself with the differences and similarities between states and international organisations.

What follows below, is an exposition of some basic concepts regarding the law of treaties that need to be understood in order to master the operation of treaties in practice.

3.3.1 The capacity to conclude treaties and the means of expressing consent

One of the most important points regarding international law, and specifically treaties, is the fact that it is consensual in nature – states must agree to create an international law relationship. This consent to be bound by a treaty must be made known to the other states or parties by some positive act – such an act could include signature, exchange of instruments, ratification, acceptance, approval or accession, or any other means agreed to by the parties. The treaty itself usually makes clear which one of these positive acts needs to take place in order for a state or party to express their consent to be bound. You must ensure that you study Strydom in this regard and supplement his discussion with the references to the relevant articles in the Vienna Convention on the Law of Treaties (VCLT), specifically articles 6, 11–16 and 18. Based on this discussion and your analysis of the relevant VCLT provisions, what legal effect do 'ratification', 'acceptance', 'approval' and 'accession' have? How is signature or the exchange of instruments linked to ratification, acceptance or approval? What advantages could signing a treaty subject to delayed ratification have? With regards to the last question, see the discussion on pages 69-70 of Strydom and take note of the Latin term *pacta sunt servanda* as well as the content of Articles 26 and 27 of the VCLT.

After mastering the above, ensure that you understand that the VCLT effectively identifies six methods through which a state can express its consent (articles 11–15). That said, perhaps the following two terms require some added explanation:

(1) **Ratification:** In principle treaties come into operation on signature however, this is not always the case. Most treaties have the additional requirement of ratification. Article 1(b) of the VCLT defines ratification as 'the international act ... whereby a State establishes on an international plane its consent to be bound by a treaty'. No specific procedure is laid down, as this is a matter for the states' national law. The parties sign the treaty and then each state has a 'second chance' to confirm its intention

to be bound or to amend its national law in order to meet its obligations under the treaty. Note that ratification binds the state internationally and that until a treaty (that requires ratification) has been ratified, it does not bind the state – although the state is obliged to do nothing that would defeat the objects of the treaty (article 18 of the VCLT).

(2) **Accession:** This is the way in which a state which was not a party to the original treaty may become a party. It does this by depositing a notice of accession. The original treaty must allow for accession, or the parties to the original treaty must agree to the 'new' state joining the treaty.

3.3.2 The authority to conclude treaties

In order to act on the international plane, all states make use of certain designated state officials in order to conduct international relations. This means that there are only certain individuals who are capable of authenticating and adopting an international treaty or who are authorised to express a state's consent to be bound by international agreements.

The authority to act on behalf of the state can derive from:

(1) *Specific authorisation* by the state to perform certain functions;
(2) *Representation* based on the state practice; or
(3) *Official position* of a designated government official.

Ensure that you understand the discussion in Strydom highlighting the differences between how the authority to act on behalf of a state can be derived. Point three above (official position) is of particular importance as they are a group of persons who, by virtue of their functions and without special authorisation, are entitled to perform functions relating to the conclusion of treaties. In this regard, article 7(2) of the VCLT such persons include the following:

- Head of state (the president/queen/king etc.);
- Head of government (prime minister – which we do not have in South Africa);
- Minister of Foreign Affairs;
- Head of a diplomatic mission (ambassador/consul); and
- State representatives at treaty-making conferences.

If a person does not fall into one of the above categories, then article 7(1) of the VCLT applies and the person will be required to provide proof of 'full powers' (see Strydom's discussion starting on page 70 as well as his reference to the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* case as an example).

Alternatively, article 7(1)(b) provides that, if it is clear from the practice of the states, or from other considerations, that the parties intended the person to represent the state, full powers are not necessary. It is important to note that, although a treaty concluded by an unauthorised person is essentially invalid (see below), all is in fact not lost. Just as in municipal law where you may ratify (approve after the fact) the unauthorised acts of your agent and thereby become bound yourself, so, too, in international law a state may

ratify the conclusion of a treaty by an unauthorised party and so give the treaty full effect (see Article 8 of the VCLT).

Activity 3.2

Consider the following facts:

The Premier of Gauteng and the Governor of Washington State, United States of America, sign an agreement. The heading of the agreement reads 'Treaty of Friendship & Cooperation'. The agreement provides, among other things, that the administrations of the Province of Gauteng, South Africa, and the State of Washington, United States of America, will cooperate in promoting cultural contact and will, on public holidays, fly each other's flags from their respective provincial/state legislatures.

Now consider the following facts:

A conference is arranged between South Africa, the United States of America and Mozambique to discuss possible compensatory payment to Mozambique for losses suffered through the following: the involvement of the former government of South Africa in the Mozambican civil war and in the shooting down of President Machel's plane, which resulted in his death. At the close of the conference, South Africa and Mozambique sign a treaty brokered by the United States providing for the payment of compensation to the Mozambican nation.

South Africa is represented at the conference by her Minister of Foreign Affairs, Mozambique by her President and the United States by her Secretary of State for Defence.

In no more than one page, analyse and compare these two scenarios on the basis of the means of expressing consent and the authority to provide consent discussed thus far.

Feedback

General

According to Article 7(1) and (2) of the Vienna Convention, the following persons may validly conclude binding treaties on behalf of their states:

Article 7(1) VC: Those persons who:

(a) Produce appropriate full powers; or
(b) It appears from the practice of the states concerned or from other circumstances that their intention was to consider those persons to be representing the state for such purposes or to dispense with full powers, are considered to be representing the state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the states to be bound by a treaty.

Article 7(2) VC: Persons by virtue of their functions and without having to produce full powers, namely:

(a) Heads of state, heads of government and ministers of foreign affairs for all acts relating to the conclusion of the treaty;
(b) Heads of diplomatic missions for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited;

(c) *Representatives accredited by states to an international conference or to an international organisation or one of its organs, for the purpose of adopting the text of a treaty in that conference, organisation, or organ.*

Scenario 1:

Neither the premiers of our provinces, nor the US state governors are mentioned as people who can bind the state ex officio (as a result of the positions they hold – art 7(2)(a), (b), (c) of the VCLT). Unless they produce full powers (documents issued by the state stating that the person named in them has the authority to bind the state) or there is a practice that they have bound the state under similar circumstances (art 7(1) of the VCLT), they do not have the power to conclude a treaty which binds the state.

This is perhaps a good time to point out the following: If the problem does not expressly include mention of a certain situation, such a situation does not exist. In other words, you cannot read the existence of full powers or a usage into the facts. If we wanted to include them, we would have mentioned them.

The fact that the agreement is called a treaty does not mean that it is indeed one. Each agreement must be tested on its own merits.

The intention of the parties was clearly to promote friendship and cooperation, not to create binding rights which can be enforced. The subject matter regulated by the agreement is simply not of the nature which involves enforceable obligations on the part of the parties.

Our conclusion is therefore that the agreement is not a treaty. It is an agreement between two unauthorised officials which would be neither governed by nor enforceable under international law.

Scenario 2:

If you compare this set of facts to the facts of the previous activity, and compare it to the requirements for a valid treaty, the differences are glaring. Here two states are concluding an agreement at a conference with a specific purpose and goal. The agreement contains reciprocal rights and duties. The states are represented by persons who satisfy the requirements of article 7(2) of the VCLT. The agreement would be governed by international law. The UN would register the treaty. Therefore, it must be a treaty.

3.3.3 The entry into force of treaties

See page 72 of Strydom for a brief discussion on this point. Take note of the possibility of the same treaty coming into force for different states in a multilateral treaty at different times.

3.3.4 Reservations to treaties

This is a very important section of the law of treaties and the work in this section must be understood and studied in detail.

Reservations are covered by the VCLT and are complemented by various decisions by the ICJ including its landmark advisory opinion *Reservations to the Convention on the Prevention of the Crime of Genocide* (1951 ICJ Rep), which established the approach later incorporated in the VCLT. Article 2(1)(d) of the VCLT defines reservations as a:

> Unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Reservations are guided by Article 19 of the VCLT which provides that:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

When dealing with reservations to treaties under international law, a few basic principles should be born in mind from the start, namely:

- Reservations arise only in multilateral treaties. In a bilateral treaty, a 'reservation' is in fact an offer by the objecting state to conclude a different treaty. If this offer is accepted, a new treaty comes into operation.
- It must be remembered that treaties are consensual. In other words, states cannot be forced to accept that which they do not wish to accept.
- The aim of a multilateral treaty is to get as many states as possible to agree on as many issues as possible. This is the basis of reservations. If they were not possible, the treaty would be sabotaged and the object of concluding the treaty would be defeated. Reservations allow a state which does not agree with all the provisions in a treaty to still become a party to the treaty and be bound by those provisions which it agrees to.

3.3.4.1 The Genocide Convention case

As was mentioned earlier, the ICJ's advisory opinion in *Reservations to the Convention on the Prevention of the Crime of Genocide*, is regarded as a momentous decision for the law of treaties and specifically reservations. In this case, the ICJ was tasked with answering whether a state that has made a reservation to the Genocide Convention can still be party to the Convention and, if so, what the legal effect would be of such reservations on states that accepted or rejected the reservation? The discussion in Strydom (pp 74–75) on this advisory opinion and its interplay between the VCLT articles dealing with reservations is vital and needs to be analysed and understood.

After reading through the discussion regarding the Genocide Convention case, can it be said that states are required to always accept a treaty subject to any reservations that

may be made? What was the court's finding in this regard? It would be a good idea to summarise this section of the textbook and have a clear picture of the interplay between the relevant VCLT Articles and the Genocide Convention case.

After making your summary, ensure that you understand the procedure for making reservations (discussed on pp 77–78 of Strydom) as well as the difference between incompatible and impermissible reservations (discussed on pp 75–77 of Strydom).

3.3.4.2 Legal effect of reservations

Together with article 19 of the VCLT and the ICJ's advisory opinion, it should be clear that the general rule is that all treaties may be accepted subject to reservations. If the treaty is silent on the question of reservations, it may be assumed that reservations are allowed. Due to the fact that treaties are consensual and a proposed reservation is an offer, it stands to reason that the other parties to the multilateral treaty may do one of two things. Such states may either accept the reservation or reject the reservation made by another state.

However, as Strydom highlights, many states often say nothing and therefore, neither accept nor reject the reservation. Failure to object to a reservation is taken to mean that a state has tacitly consented to the reservation.

Where a state does want to object to a reservation, it has the option to do one of two things:

(1) It may object to the reservation, but not to the operation of the treaty; or
(2) It may object to the reservation and to the treaty coming into operation between itself and the reserving state.

In the first case, the treaty will operate between the two states minus the offending clause. In the second case, no treaty will operate between the two states. The questions can therefore be asked what effect does a reservation have on a multilateral treaty? In answering this question, we have to distinguish between states which accept the reservation and states which reject it.

(1) Treaty obligations between states *accepting* the reservation and the reserving state

- Remember that acceptance may be either express or tacit (through silence or conduct). The entire treaty applies between the parties.
- **BUT**, the provision in the original treaty to which the reservation has been entered will be replaced by the provisions in the reservation.
- **NB:** If states A, B and C accept a reservation entered by state D, the treaty will apply normally between states A, B and C. It is only treaty relationships between state D and other states that are affected by the reservation.

(2) Treaty obligations between states rejecting the reservation and the reserving state

- Rejection of a reservation must be express. If a state rejects a reservation, the reservation doesn't come into operation between the reserving and the rejecting state (there is no consensus).
- **BUT**, the clause to which the reservation is entered also cannot apply (again there is no consensus) and it is removed from the treaty for those parties. If a *lacuna* (vacuum) arises from the cancellation of the clause, customary international law will apply to that aspect (see section 4 below). The rest of the treaty (all the provisions minus those to which reservations have been entered) applies between the parties.
- If the state rejects the reservation and the treaty coming into operation, the treaty will not operate between the two states.
- **Remember:** treaty obligations between all non-reserving parties remain unaffected by the reservation.

One last point to remember under the legal effect of reservations, is that fact that there is a difference between reservations and interpretative declarations. In this regard, your attention should be drawn to the quotation and accompanying explanation given in Strydom (p 78).

3.3.4.3 Reservations to human rights treaties

Traditionally, multilateral treaties are concluded to 'accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States'. However, modern international human rights law concerns itself with the basic rights and protection that should be afforded to individuals and not states themselves. In this regard, human rights lawyers have advocated the position that states owe an *erga omnes* obligation to the international community to uphold international human rights standards – *erga omnes* obligations are those obligations which are owed to the international community as a whole and are thus in the interest of every state to support. Read through this section and form your own opinion on the current state of affairs. Should states be entitled to make reservations to human rights conventions? If there is a provision in a multilateral treaty calling on all arrested persons to be brought before a court within 48 hours and State A makes a reservation to such a provision, should State B and C accept this (taking note of the fact that should they reject the reservation, State A may simply not join the treaty at all and then all provisions (including the 48 hour provision) will not bind State A). Remember that the aim of multilateral treaties is to get as many states as possible to agree on as much as possible. What, if any, is the relationship between the main aim of reservations and modern international human rights standards?

3.3.5 Interpretation of treaties

Article 31(1) of the VCLT makes clear that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Despite this provision however, treaty interpretation remains a complex process and one of the most controversial issues in international law. Article 31(1) of the VCLT has acquired the status of customary international law and is made up of three elements – the text (which includes the preamble and any annexes to the treaty); the context (illustrated in article 31(2)(a) and (b) of the VCLT); and the object and purpose. For purposes of this section, ensure that you understand that treaty interpretation is based firstly on a general rule of interpretation, and secondly on supplementary means of interpretation. Additionally, certify that you understand the three elements above and how they aid in the interpretation of treaties.

3.3.6 Invalidity, termination and suspension of treaties

The above discussion has focused on the operation of treaties but such a discussion would be incomplete without reference to how treaties are terminated or cease to operate. As with all previous sections, keep in mind that the VCLT is crucial when dealing with treaties – their completion, operation and termination are all linked to the direct application of the VCLT.

Strydom explains that the difference between the invalidity of a treaty and the termination of a treaty are different in that the validity of a treaty 'can only be contested by a state on grounds determined by the VCLT, while in the case of termination, suspension, denunciation or withdrawal, room is left for the contractual freedom of the parties as expressed in the treaty between them'.

Before reading further, reflect on this quote. In your own words, explain what the difference between invalidity and the termination of a treaty is.

3.3.6.1 Invalidity of treaties

A treaty can be deemed to be invalid on several grounds. Some of these are summarised, noting the relevant Articles of the VCLT, in the table below (these grounds correspond to those that you will find in most national legal systems):

Article 48: Error	**Article 49: Fraud**	**Article 50: Corruption**	**Article 51: Coercion**	**Article 52: Threat/use of force**
A state may invoke error if it assumed the following: 1. A fact or situation (which was) 2. Material (and) 3. Formed the basis of consent	A state may invoke fraud if: 1. It was induced by 2. Fraudulent action 3. Of other negotiating states to conclude the treaty.	A state may invoke corruption if there was: 1. Direct or indirect corruption (of) 2. The state's representative (by)	A state may invoke coercion where there was: 1. Coercion of a representative 2. By acts or threats 3. Against the representative 4. By any person.	A state may invoke force if there was: 1. Coercion of a state 2. By threat *or* use of force 3. Contrary to the principles of international

Article 48: Error	Article 49: Fraud	Article 50: Corruption	Article 51: Coercion	Article 52: Threat/use of force
4. When the treaty was concluded AND 5. It did not itself contribute to the error; or 6. The circum-stances were not suspicious.		3. Another negotiating state.		law in the UN Charter.

Using the above table, Strydom (pp 83–84) and the relevant VCLT Articles, what would you say is the effect of error, fraud, corruption or coercion of a state official on the validity of a treaty?

Another important article which has an impact on the validity of treaties is article 53 of the VCLT. Article 53 provides that:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Before going further, reflect on article 53. What do you think it means when it defines a peremptory norm as one from which 'no derogation is permitted'?

Using the discussion in Strydom (p 84), it should be clear that a peremptory norms (also referred to as *ius cogens* or *jus cogens* norms) have a somewhat special character in international law. The requirements for a rule of *jus cogens* are much the same as those for custom (see section 4 below), with the important difference that states cannot 'contract out' of *jus cogens* – such a norm is absolutely binding on all states. As Strydom highlights, because it is so important and binds all states, there is some controversy about what exactly constitutes *jus cogens*. One rule that is generally accepted as being a *jus cogens* norm is the prohibition on the use of force (see article 2(4) of the UN Charter).

So the question remains, what is the effect of *jus cogens* on the existence of a treaty? A treaty which conflicts with an existing norm of *jus cogens* is void *ab initio* and no treaty comes into existence.

3.3.6.2 Termination and suspension of treaties

For this section, articles 54–64 of the VCLT are of particular importance. Although states may mutually consent to the suspension or termination of a treaty, the focus of this section is the situation where the treaty may still be valid (distinguish this from the discussion under 3 6 1 above) but due to a breach of the treaty by a party, the treaty is terminated or suspended. Four instances where a treaty may be terminated or suspended are discussed in Strydom (pp 84–86), namely:

(1) Material breach (VCLT article 60);
(2) Supervening impossibility of performance (VCLT article 61);
(3) A fundamental change in circumstances (VCLT article 62); and
(4) The emergence of a new peremptory norm of international law (VCLT article 64).

With reference to the above, you will be required to analyse and understand the relevant articles as well as the discussion in Strydom in order to acquire a sound knowledge of the ways in which a treaty may be terminated or suspended. In each case, know which article applies, what the effect of a particular breach on a treaty is, and how a state can rely on each instance in order to terminate or suspend the treaty.

3.3.6.3 Treaties and domestic law

Study

- Study Strydom, Chapter 3 pp 86–89

Section 231 of the Constitution is of paramount importance here. Study the discussion in Strydom carefully, including the case law included therein. However, since this can be a tricky section of the work, we have provided some additional remarks of our own. Please study this section of the guide in conjunction with your textbook:

The 1996 Constitution devotes a separate section, section 231, to 'International agreements'. This section reads as follows:

231(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
231(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
231(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
231(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

231(5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

When studying section 231 make a distinction in your mind between those provisions relevant for determining whether a treaty **binds South Africa on the international plane** and those relating to whether a treaty has **legal effect domestically,** i.e. whether a domestic court can directly apply such a treaty. Sections 231(1), 231(2) and 231(3) are relevant for determining whether a treaty binds South Africa on the international plane. Section 231(4), on the other hand, tells us when a treaty that is binding on South Africa internationally becomes law in South Africa.

Section 231(1)

This section provides who may negotiate and sign treaties. In practice the President does not negotiate treaties and signs very few personally. This power is delegated to the Department of Foreign Affairs or line-function minister in charge of the topic covered by the treaty. The 1996 section acknowledges this fact.

Section 231(2)

This section deals with what is often called 'international ratification'. In other words, the process by which a treaty becomes binding for South Africa on the international plane.

The 1996 provision simplifies its 1993 counterpart by replacing the terms 'ratification' and 'accession', with 'approval'. It also addresses the way in which this is to be done: by resolution in both houses of parliament.

Please note that although both houses of parliament approve the process, this is not the same as the adoption of legislation which is subject to all the procedures prescribed in the Constitution under 'National Legislative Process' section 73 and further. Therefore approval under section 231(2) does not bring the treaty into effect in our national law – if it did, why would we have 231(4)?

Section 231(3)

First, we must distinguish between four types of treaty:

(1) technical treaties
(2) administrative treaties
(3) executive treaties
(4) treaties which require neither ratification nor accession

Secondly, what makes these treaties different is that they bind the Republic on the international plane without approval by the National Assembly and the National Council of Provinces.

In practice, section 231(3) treaties are approached as two categories.

First there are technical, administrative or executive agreements. These are regarded as agreements of a routine nature flowing from the day-to-day activities of government

departments, they generally also have no budgetary implications for the country. The problem remains, however, that it is the department concerned which makes the primary decision on what it regards as day-to-day! The potential for manipulation and abuse is self-evident. However, where there is doubt as to whether a treaty should be regarded as technical, administrative or executive, the policy is to rather adopt the section 231(2) procedure.

As students often have difficulty with these concepts, let's try and explain this by means of an example.

> The Minister of Education (or perhaps it should be Public Works!) concludes a treaty with the United States, in terms of which the US undertakes to provide R5 million for upgrading South African rural schools. The parties agree that the money will be made available, as and when the Minister identifies a school in need. This is a normal assistance treaty and will become part of our law only once incorporated under section 231(4) which we will be considering below.
>
> The Minister identifies one school in Mpumalanga in March which requires upgrading. The next one she encounters is in Kwazulu in December, and the next in Limpopo in June of the following year. In each instance she approaches the US for the necessary funds. Strictly speaking, each request and consent is a treaty and could, in strict terms, be subject to the full treaty process were it not for section 231(3).
>
> But look more closely at these last three 'treaties' – they are in essence administrative, they flow from the day-to-day activites of the Department of Education, and, given the provisions in the original treaty (the Minister will identify the schools) they are routine. They also involve no financial burdens for the state (and so for you and me). Therefore, it is to no-one's detriment if they are merely approved by the two houses.

The second category is treaties not requiring ratification. This is a relatively simple determination in that a treaty will generally provide whether or not ratification is required. If the treaty is silent on this point, the intention of the parties will be decisive. In fact, most bilateral treaties will fall into this category. As the majority of the treaties concluded by the state are bilateral, the 'international ratification' of a treaty in terms of section 231(2) will apply to most, but not all, bilateral treaties. For example, an extradition treaty is generally bilateral and would in theory not require ratification under section 231(2). However, the Extradition Act 67 of 1962, has been amended to provide for ratification in terms of section 231 of the Constitution. In this case, therefore, the intention is to require ratification and parliamentary approval is required in the case of extradition treaties.

This is, however, not a free-for-all as may initially appear. There is some measure of control on these treaties in the sense that they are required to be laid before both houses of parliament within a reasonable time. Although this is a relatively 'weak' control, it does mean that opposition parties will be in a position to ask questions about the agreements, and some measure of public awareness should result.

Section 231(4)

This section deals with the way in which a treaty negotiated by the executive and approved by parliament (or laid before both houses in the case of our four 'special' treaties above) becomes law in the Republic. In other words the process necessary to transpose a treaty from the international plane to the national plane.

Please note: Section 231(4) is perfectly clear where it states that ANY treaty (therefore also those under 231(3)) must be incorporated by national legislation. There is one exception in the form of self-executing treaties as you will see below. However section 231(3) treaties cannot be self-executing as you will also see below.

As stated, the section allows for one exception in the case of a self-executing provision of an agreement that has been approved by parliament. Such a provision will be law in the Republic without the need for national legislation provided that it is not inconsistent with the Constitution or an Act of parliament.

The concept of the self-executing treaty is wholly foreign to our legal system (and to the British system which we have traditionally followed). It is an American concept which has now been 'dragged' into our law at the eleventh hour of the constitution-writing process.

A self-executing treaty is defined by Shearer (*Starke's International Law* 1994 at 75) as follows:

> [A treaty] which does not in the view of the American courts expressly or by its nature require legislation to make it operative within the municipal field, and that is to be determined by regard to the intention of the signatory parties and to the surrounding circumstances.

We can of course, replace 'the American courts' with 'the South African courts' in this passage. Therefore a South African court will have to examine whether or not a particular provision in a treaty before it either by the nature of the provision, or expressly does not require legislation to bring it into operation municipally.

To determine this, the court will have to examine:

- the intention of the signatories
- the surrounding circumstances

The difficulty of establishing whether a provision in a treaty is self-executing can be illustrated with reference to two US Supreme Court decisions. The self-executing provision doctrine can be traced back to *Foster and Elam v Neilson* 27 US 253, 7 L.Ed 415 (1829) decided in the US Supreme Court. Chief Justice Marshall held that article 8 in the Treaty of Amity between the United States and the Spain was not self-executing.

In a subsequent case, *United States v Percheman* 32 US 51, 8 L.Ed 604 (1833) interpreting the Spanish version of the same treaty, the very same judge (Marshall), found article 8 to be self-executing.

The self-executing clause applies only to treaties approved by parliament (once it has been approved by parliament – section 231(2)). Therefore one may conclude that the

four categories of treaty which appear in section 231(3) and which bind internationally without parliamentary approval, do not fall within the ambit of section 231(4). (They have, after all not been approved by parliament.) If a party therefore claims (and note this can be in any court) that a treaty is self-executing, the judicial officer will have to determine:

(1) Whether the treaty has been concluded and binds SA through parliamentary approval.
(2) Whether the treaty falls within one of the four exceptions in section 231(3) in which case it binds without parliamentary approval.
(3) If it falls within one of these exceptions, then it cannot (presumably from the wording) be self-executing.
(4) If it doesn't fall within one of the exceptions, he will then have to:

    (a) determine the intention of the signatories
    (b) examine the surrounding circumstances

(5) From this he will have to examine whether the treaty contains any provision which requires legislation to make it operative municipally.
(6) He will also have to examine the nature of the treaty to see whether treaties of that kind require legislation to make them operative municipally (this would entail a vast comparative study!).
(7) As if this were not enough, he then has to determine whether the treaty conflicts with the Constitution
(8) He also has to examine whether it conflicts with an Act of parliament – and in this regard he will have also to consider section 233 which we will discuss later on.

All we can do at this stage is wish our judiciary luck – Solomon's task was nothing compared to theirs! Make sure that you also study Strydom's discussion on pp 87–89 in this regard, particlularly of the judgments in *Goodwin* and *Quagliani*.

Section 231(5)

This is a typical succession provision which you will find in most constitutions. It is important to note that the legal entity bound by the treaty is the state, and not the government (which is likely to change from time to time).

3.4 CUSTOMARY INTERNATIONAL LAW

Study

- Study Strydom Chapter 3 pp 90–93.
- Smith pp 599–600.

International law making by way of state practice (custom) is highlighted in article 38(1)(b) of the ICJ Statute as a source of international law. Diplomatic interactions and engagements between African peoples and state entities in pre-colonial Africa were mainly regulated by the principles of customary law (Smith pp 599–600). For example early European explorers to Africa noted widespread practices such as the protection of

unwritten contracts through oaths and medicines (Smith p 600). The major difference between custom and treaties, as a source of international law, is that custom binds all states whereas treaties only bind those states who are party to the treaty. For this section, you are required to understand and study the requirements for custom, how they are related as well as the case law discussed.

Article 38(1)(b) of the ICJ Statute states that the court will apply 'international custom, as *evidence of a general practice accepted as law*'. This provision implies that two requirements must both be present for a rule of customary international to develop, namely:

(1) General practice (referred to as *usus*); and
(2) Accepted as law (*opinio juris*).

The following in depth discussion regarding the requirements for custom should be supplemented with the discussion in Strydom, paying specific attention to the judgements and their relevance to each requirement. Please note that Strydom refers to the *usus* requirement as 'evidence' and all references to evidence in this section of Strydom should be dealt with in light of the below discussion regarding *usus*.

3.4.1 *Usus:* The first requirement

There must be a general practice among states for custom to develop. This requirement is defined in the *Asylum* case 1950 ICJ Rep as 'constant and uniform usage'.

A number of elements have been identified which must be considered when deciding whether or not a general practice/usage has developed.

Uniformity: Does this mean that the usage must be followed in exactly the same way by every state? See the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* 1986 ICJ Rep par 202 for the concept of 'substantial compliance' as well as Strydom's discussion of the case (pp 91–92).

Repetition: How many repetitions do there have to be to make a custom? Here, you will have to consider the nature of the rule involved. If it is a rule that will affect most states, there will be a greater number of repetitions required. If, however, it is a rule which can in essence affect only a few states, fewer repetitions – in fact even one or two – would be sufficient. For example, a rule relating to the use of outer space affects only those states involved in space exploration (which is only a handful of states at this point). Thus, if they all agree, there is no reason to refuse to acknowledge the rule because the practice has occurred only once or twice.

Time: Closely related to the number of repetitions is the question of the length of time a usage must persist. By its nature, custom is a slow process. There are, however, no hard-and-fast rules. Again, the nature of the usage will often be decisive – and, again, space exploration can serve as an example. This is echoed in *S v Petane* 1988 3 SA 51 (C), where a South African court, considering the formation of custom, cited General Assembly Resolution XVIII (1962) as a customary rule which developed with little or no practice.

The number of states: How many states must follow a usage, and are all states bound by it? See, in general, the *Fisheries Jurisdiction* case 1974 ICJ Rep, the *North Sea Continental Shelf* case 1969 ICJ Rep, and the *South West Africa* case, *Second Phase* 1966 ICJ Rep.

Can a usage develop between two, or only a few, states? Here we are dealing with a local or regional custom and there is no reason why such a custom should not develop. See the *Case Concerning Right of Passage over Indian Territory* 1960 ICJ Rep. However, see, too, the *Asylum* case where a different view was adopted.

Related to this is the question whether a state which has opposed the formation of a custom, is bound by it – termed the 'rule of the persistent objector (see Strydom pp 92–93). Examples of this rule can be found in the *Anglo-Norwegian Fisheries* Case 1951 ICJ Rep, the *North Sea Continental Shelf* Case 1969 ICJ Rep, the *Asylum* case 1950 ICJ Rep, and the *Nicaragua* case 1986 ICJ Rep.

Actions speak louder than words: There is often a considerable difference between what states say and what they do. Must a state do what it says before a practice can develop? Ideally, the answer is 'Yes', and this was the approach adopted by Justice Van Wyk in the majority decision given in the *South West Africa* case, *Second Phase*. The only generally recognised exception was that, where a state had not yet had an opportunity to give concrete expression to its intentions on a particular issue, its statements alone would be sufficient to establish a usage. However, we feel that the trend started by Justice Tanaka in his dissenting opinion in the *South West Africa* case, *Second Phase*, and carried further in the *Nicaragua* case, has had an effect. By softening the absolute approach to practice in general and finding that the conduct of states should, 'in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule' the ICJ has provided a loophole for states not to do exactly what they say. Inconsistent behaviour can therefore be seen as a 'slip' in state practice which will make proof more difficult, but it will not exclude the possibility of the practice developing.

Where does one find practice? It is all well and good to say that you must establish a settled practice, but where do you go to find it? The simple answer is anywhere where the practice of the state is reflected. This can be newspapers, court decisions, communiqués, the opinions of law advisers, law journals etc. Obviously, the attitudes of members of civil society (who are generally not recognised as subjects of international law) cannot form the basis of customary international law. However, Judge Van Den Wyngaert, in a well-received dissenting opinion in the *Arrest Warrant Case (DRC v Belgium)* 2002 ICJ Rep, found that the opinion of civil society 'cannot be completely discounted in the formation of customary international law today'. In finding that, under customary international law, a Minister of Foreign Affairs is not immune from the jurisdiction of other states when charged with war crimes and crimes against humanity, the *ad hoc* judge referred to several 'scholarly organizations' such as the International Law Association, Amnesty International and Human Rights Watch. BUT this does not mean that such opinions can be exclusively relied on.

3.4.2 *Opinio juris:* The second requirement:

Once we have applied all of the above regarding *usus*, we will still not have a rule of customary international law – we merely have 'settled practice'. This is generally referred to as usage and represents the first essential stage of custom development. The question then remains, what is required to turn this usage into law?

It is relatively easy to prove a usage, as it is based on the concrete behaviour of states. *Opinio juris*, however, is not so simple and, as Strydom highlights, it is 'difficult to understand how a single human mind works, let alone the mind of a state'. It is for this reason that *opinio juris* is also referred to as the 'psychological' or 'subjective' element.

One of the clearest formulations of *opinio juris* can be found in the *North Sea Continental Shelf* cases 1969 ICJ Rep. The state must comply with the usage/practice because it feels legally obliged to do so. It must feel that, if it does not follow the usage, it will be committing an international 'wrong' – that is, that it will be breaking international law.

Following a rule simply because you feel that it is the 'right' or morally correct thing to do is insufficient. In the *Arrest Warrant* case 2002 ICJ Rep, the majority of the court found that there was a rule of customary international law granting a serving Minister of Foreign Affairs full immunity from criminal jurisdiction.

In her dissenting opinion, Judge Van Den Wyngaert found that the negative state practice of not instituting criminal proceedings against Ministers of Foreign Affairs could meet the test of *opinio juris* only if it were shown that the practice was the result of the relevant states being conscious of a legal duty not to prosecute. Therefore, it is not enough that there was no practice of instituting criminal proceedings against Ministers of Foreign Affairs. In addition, this failure to institute criminal proceedings against Ministers of Foreign Affairs must be based on the state believing that it has a legal obligation not to prosecute.

Activity 6

(1) Using Strydom and the information above, write an essay in which you highlight where custom (as a source of international law) can be found and how it is formed. In the essay, focus on what the requirements for custom are, who is bound by custom, and what effect the rule of the persistent objector has on the formation of an international custom.

Guidelines:

- Start by quoting article 38(1)(b) of the ICJ Statute.
- Thereafter discuss both requirements for custom: usus and opinio juris. Do not forget to include discussions of relevant case law, as shown above.
- Describe the rule of the persistent objector with reference to the Anglo-Norwegian Fisheries Case North Sea Continental Shelf Case, the Asylum case, and the Nicaragua case.

(2) Using Smith, and the information provided above, highlight the extent to which African customary law informed the way pre-colonial African kingdoms practiced international law and foreign relations.

Guidelines:

- Start by briefly explaining the relationship between African customary law and international law
- Then provide examples on how certain principles of African customary law underlined issues such as salience of contracts, exchange/recognition of ambassadors, and diplomatic immunity granted to emissaries or ambassadors.

3.4.3 Custom ary international law and domestic law

In the 1996 Constitution, customary law has earned a section all to itself.

Section 232 reads as follows:

> 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

In terms of this provision, all customary international law is part of our law provided that

- the custom must **not conflict with the Constitution** ; and
- the custom must **not conflict with an Act of parliament**

It must be noted that section 232 provides simply that customary international law is 'law' in the Republic without any qualification about where it fits into the hierarchy or pattern of law before the Constitution was adopted. The conclusion is therefore that customary international law is on an equal footing with common law, and (non-conflicting) statutes and must be applied as such by the courts.

Activity 3.3

South Africa is not formally a party to the Vienna Convention on the Law of Treaties but has declared that it regards the treaty's provisions as binding. Treaty interpretation is governed by articles 31 and 32 of the Vienna Convention. You are the advocate for the defence in a case before a South African municipal court where the interpretation of a treaty is at issue. You argue that the court must interpret the treaty in terms of the Vienna Convention. The advocate for the state, on the other hand, argues that because South Africa has not formally signed the Vienna Convention, its provisions are not relevant in a South African court. Explain, with reference to the Constitution of South Africa, 1996 why you feel the court is entitled to make use of the interpretation.

Feedback

The question you must answer is whether or not the municipal court must apply the VCLT provisions in interpreting the treaty. If you want to apply these provisions you must have a basis in South African law on which to work. The two most obvious bases are treaty and custom. The most obvious basis is treaty–and this is what most students would (incorrectly) go for in an examination, because they have seen the magic word 'treaty'. However, this simply proves that they have not read the question, because the very first statement in the question says that South Africa is not a party to the VCLT. Therefore the VCLT cannot be

applied as a treaty incorporated into our law because firstly we are not a party to it and secondly there is no indication in the facts that it has been incorporated as required by section 231(4) of the Constitution.

The VCLT cannot be used on the basis that it forms part of our law. The obvious basis that remains is custom. You must therefore test the VCLT against the requirements for customary international law. Here you must look at the nature of the VCLT. The latter is a codification (a bringing together in written form) of the customary international law governing treaties existing at the time of its compilation. You will also remember that the Nicaragua case has shown that if custom is incorporated in a treaty, this does not mean that the customary rules fall away. Customary rules continue to exist alongside the treaty and are binding on states who are not party to the treaty.

What are the requirements for custom? First, usus is required. The very fact that the VCLT was drawn up proves that this requirement has been met as the VCLT is a compilation of the rules governing treaties which states at that time considered to be general rules of international law. Remember to quote the cases dealing with usage. Opinio iuris too has been met because the treaty is generally accepted. In the case of South Africa, we make things clear by stating South Africa has declared that it regards the provisions as binding. A clearer expression of opinio iuris would not be easy to find. Remember to quote the cases relevant to opinion iuris.

The VCLT meets the requirements set in South African legislation (and international law) for the existence of a customary rule of international law. What is the position of customary international law in our law? In terms of the 1996 Constitution, customary international law is law in the Republic unless it conflicts with the Constitution or an Act of parliament. The VCLT does neither. Articles 31 and 32 of the VCLT are therefore law in the Republic and the court must interpret the treaty in terms of these provisions.

3.5 GENERAL PRINCIPLES OF LAW

Study

- Study Strydom, Cha;pter 3 pp 93–94

Article 38(1)(c) lists general principles as a source of international law, indicating that the ICJ shall apply "the general principles of law recognized by civilized nations."

This provision was inserted to provide answers in cases where a particular situation was not covered or regulated by treaty or customary international law.

This source has started becoming more important in international law, which struggles to keep abreast of rapid changes in a globalising world. While it is not possible to give strict requirements which will allow you to recognise these principles, for each case has to be judged on its own merits, Strydom gives examples of some generally accepted principles that can be said to form part of this source – take note of these examples. It has to be emphasised that although some of these sources have been relied on in international courts and tribunals, no dispute has been determined solely on the basis of some or other general principle of law.

3.6 JUDICIAL DECISIONS AND THE TEACHINGS OF PUBLICISTS

Study

- Study Strydom, Chapter 3, p 94

This is the final source recognised by article 38(1) of the Statute of the ICJ where it provides in subsection (d) that the court shall apply: "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law."

There are two modifiers in this Article. Firstly, article 59, and, secondly, the term 'subsidiary means'. Both must be considered if you wish to apply this article. Article 59 of the ICJ Statute provides that ICJ decisions bind only the parties involved and are binding only for that specific case. As mentioned in Strydom, the law of precedent, therefore, does not apply in international law.

A question that arises is whether judicial decisions should be interpreted solely as the decisions of international courts, or whether the decisions of municipal courts may also be consulted? The general consensus is that if an important point has been thoroughly examined in a municipal context, the court could also refer to it.

The article also entitles the court to use the works of international writers. However, the question arises as to how the 'most highly qualified' publicists are determined?

It is important to remember that the use of 'publicists' and 'judicial decisions' is classified as a subsidiary means for the determination of rules of law. Ensure that you understand why, as explained in Strydom, the sources listed in Article 38(1)(d) are classified as subsidiary.

3.7 SOURCES FALLING OUTSIDE THE SCOPE OF ARTICLE 38

Study

- Study Strydom Chapter 3 pp 94–99

Strydom succinctly captures the issue surrounding this section when he states that:

> There is a continuing debate in international law about whether Article 38 contains a complete list of international law sources or whether, in the course of time, other sources have emerged, nor foreseen at the time when the ICJ Statute was drafted and which cannot be overlooked in view of their impact on the development of international law.

For the purposes of this section, you will be required to study Strydom and formulate your own opinions on the following issues:

- Considering that the resolutions of the General Assembly are non-binding, should such resolutions be considered as separate sources of international law? Would your

answer differ if asked about Security Council Resolutions rather than declarations of the General Assembly?
- Having read Strydom (pp 94–99), you should be able to elaborate on whether the current list of sources in article 38 is sufficient and why you believe it to be so.

The International Law Commission:

In order to rectify the situation where many international law rules (especially customs) are unwritten and undefined – making it difficult to establish just what the norms are – the international community set up the International Law Commission (ILC). The purpose of the ILC is to get a group of experts together and to write down (or codify) international law in a single, subject-specific document which then serves as a point of reference. In this way, the existing international law is written down for use by international courts. At the same time, the law is developed as and when the compilers see obvious gaps or things that have changed. Take note of the examples of successful codifications that are mentioned in Strydom (p 98).

3.8 THE DEBATE ON THE HIERARCHY OF INTERNATIONAL LAW NORMS: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES*

Study

- Study Strydom, Chapter 3 pp 100–104.

As has been alluded to earlier in this learning unit, the concept of *jus cogens* challenges the idea that the consent of states is the cornerstone of international law. Therefore, *jus cogens* norms represent the situation where a state may not necessarily agree with a certain rule, but by which it is nevertheless bound. South Africa and apartheid are a classic example here. It should therefore not be surprising that the concept of *erga omnes* obligations was first set out in one of the *South West Africa* cases.

For this section, you are required to study Strydom and ensure that you understand these two concepts (*jus cogens* and obligations *erga omnes*), are able to indicate their references in case law and other relevant sources, give examples of what are generally accepted *jus cogens* norms, and can assess their impact on traditional international law thinking.

3.9 THE DIRECT AND INDIRECT APPLICATION OF INTERNATIONAL LAW IN SOUTH AFRICAN DOMESTIC LAW

This particular issue has not been discussed in detail in your textbook, so we would like to draw your attention to the following:

In the 1996 Constitution international law has been accorded a dual role. In the first place there are those provisions which empower the courts to apply the rules of international law as law. In other words, the courts apply international law directly. We have already

discussed treaties (s 231) and custom (s 232). International law, however, is also given a second, and perhaps a more important, function as a tool for the interpretation of provisions in the Constitution (s 39) or of legislation in general (s 233).

In the first instance we are dealing with a direct application of international law principles either because they are part of our law (custom), or because they have been brought into our law by a specific procedure (treaty). In the second instance, however, the courts are not applying international law as such. What they are doing is testing South African law against international law to determine the meaning of the provisions of our law. In some instances international law is merely 'advisory' (s 39), in others it determines the meaning which the provision should bear (s 233). The content of existing South African law is determined by reference to international law. In either event, you as a practitioner must be in a position to either understand and apply international law (if you are the presiding officer or a state official) or understand and present it (if you are appearing for the state or the defence, or are advising on political trends).

To recap, the application of international law in South African law falls into two broad categories: (1) direct application of international law principles; and (2) indirect application as part of the interpretive process.

The direct application of international law has already been discussed above. However, the indirect application of international law deserves further elaboration:

Section 39

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights (BoR). In *S v Makwanyane* it was stated that international law in this context refers both to binding and nonbinding international law. International agreements and customary international law provide the framework within which the BoR can be evaluated and understood. Guidance on the interpretation of its provisions can be obtained from views expressed by the UN Committee on Human Rights and the European Commission on Human Rights, and from decisions of the Inter-American Court of Human Rights and the European Court of Human Rights. It must be remarked, however, that international law, which may advise the court in terms of s 39(1)(b), is not limited to international human rights law.

For example, in *Prince v President of the Law Society, Cape of Good Hope* the court had to interpret the provision protecting religious freedom in the context of the use of cannabis for religious purposes. It was found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

It is important to remember that the role of international law in such instances is advisory. The courts *do not apply* the international law rules they have consulted *directly,* in a way in which they would apply, for example, the provision of a South African statute. The courts consult international law in order to flesh out the provision of our BoR which has come under their scrutiny. It is the BoR provision which the courts will apply, but the meaning of that provision has been molded by international law. Therefore we refer to an indirect application of international law.

However, although this is the basic rule, you also have to consider which source of international law the court is working with in interpreting the BoR. If it is a treaty which has been transformed into South African law in terms of section 231(4) or if it is a rule of customary international law which does not conflict with the Constitution or an Act of parliament under section 232, these will be part of South African law and as such will have to be applied, not merely considered, even when interpreting the BoR under section 39.

Given the importance of the human rights culture in South Africa, the indirect application of international law has become prominent in our Constitutional Court jurisprudence. Subsequently, international human rights norms and decisions have been invoked on a number of occasions by the Constitutional Court, some of which are listed below:

In *S v Williams* the court had to consider the prohibition on cruel, inhuman and degrading treatment or punishment. The court observed that the wording of the section corresponded to the wording used in international instruments. It also remarked that in interpreting the constitutional provision, one must have regard to the "emerging consensus of values in the civilized international community" and that "the manner in which the concepts are dealt with in public international law" is a source of valuable insights. The judgment referred to decisions of the UN Human Rights Committee (interpreting corresponding provisions of the International Covenant on Civil and Political Rights–ICCPR) and the ECHR (interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms).

S v Rens concerned the issue of fairness in appellate proceedings. The court considered ECHR decisions on the same topic.

In interpreting the right to privacy in *Bernstein v* Bester, the court referred to decisions of the ECHR.

In *In re Gauteng School Education Bill* a minority group had challenged the validity of an education Bill. In order to give judgment on the matter, the court examined the practice of the League of Nations and the United Nations related to minority rights.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court had to decide on the constitutionality of the common law offence of sodomy. The court referred to ECHR decisions as well as the view of the Human Rights Committee in *Toonen v Australia*.

The corporal punishment in independent schools came under constitutional scrutiny in *Christian Education South Africa v Minister of Education*. The court invoked South Africa's obligations under the Convention against Torture and the Convention on the Rights of the Child.

In *Mohamed v President of the RSA* the court had to decide on the validity of an accused person's deportation to a country in which there was a risk of the death penalty being imposed on the deportee. In reaching a conclusion, the court referred to decisions of the ECHR.

In *Minister of Health v TAC (No2)* the court had to interpret the meaning of the phrase "minimum core economic and social obligations". The court examined this concept as it

was developed by the Committee on Economic, Social and Cultural Rights (established under the International Covenant on Economic, Social and Cultural Rights).

In terms of s 39(2) any court, tribunal or forum is required to promote the spirit, purport and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport and objects are linked to international law and the values and approaches of the international community. In *Carmichele v Minister of Safety and Security* the court developed a new rule of common law, dealing with delictual liability of the SAPS. It considered extensively international jurisprudence (including soft law sources). For example, the court cited decisions of ECHR, provisions of the Convention on Elimination of All Forms of Discrimination against Women, as well as UN guidelines on the role of prosecutors before concluding that South African common law was out of line with the spirit of the Constitution. Once again, acting in terms of the provisions of this section, the court will not apply international law directly. It is South African law (for example a common law rule) which will be applied, but at the time of its application it will have been infused with the relevant international law values. This section therefore refers to an indirect application of international law.

Self-assessment

(1) You have encountered the concept of jus cogens in a number of places while you were studying this study unit. Identify where this concept has been discussed and then analyse the role it plays in each of these instances.

(2) The ICJ's Advisory Opinion on Reservations to the Convention on the Prevention of the Crime of Genocide *1951 ICJ Rep was seminal as regards the status of reservations to treaties. Analyse the effect which this opinion has had on advancing or retarding multilateral international relations.*

(3) For 45 years, South Africa has drawn electricity from a source located in Zimbabwe – this electricity is essential for the economic development of South Africa. That said, no formal agreement has ever been concluded between the parties. After a democratic election in Zimbabwe, a new government comes to power.

This government immediately closes off South Africa's access to this power source. The South Africa government registers a formal protest with the new Zimbabwean government. After consideration of the protest, Zimbabwe issues a statement in which it acknowledges that it feels obliged to meet its obligations to supply South Africa with power and the power supply is restored. However, this is short lived and one month later Zimbabwe again cuts off the power supply, declaring that it is under no obligation to facilitate South African domination of the region by supplying cheap power. South Africa claims that Zimbabwe has breached a norm of international law.

Using these facts, identify the norm on which South Africa will have to rely. Discuss all aspects of the requirements for the formation of this norm through an analysis of the facts given.

Learning unit 4

The fundamental principles of the international legal order

In this learning unit we consider the following:

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Learning outcomes

After working through this learning unit, you should be able to:

- Describe and define the principles of sovereign equality and good faith;
- Understand the issues raised by critical scholars regarding the unequal structure of the international system;
- Indicate in which international instruments the abovementioned principles can be found
- Apply these principles to practical scenarios;
- Explain what is meant by 'peaceful settlement of disputes' and explain the content and application of the UN Charter provisions related thereto;
- Analyse the impact, which the prohibition of the use of force has had on modern-day international law;
- Apply the rules and principles related to the prohibiton of the use of force to practical situations;
- Define the term "state liability" and distinguish between the different types thereof;
- Understand when an act may be attributable to a state;
- Discuss the provisions of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC Draft Articles on Diplomatic Protection and the ILC Draft Articles on Responsibility of International Organisations and apply those provisions to practical situations.

Prescribed study material

- Strydom (ed) *International Law* Chapter 3 pp 108–159.
- Charter of the United Nations, 1945

4.1 INTRODUCTION

This learning unit elaborates on a number of fundamental principles, which Strydom *et al* term 'the undisputed normative and binding framework for lawful conduct in international affairs'. Let us have a look at the most important ones.

4.2 SOVEREIGN EQUALITY

Study

- Study Strydom, Chapter 4, pp 108 –110
- Study Mutua and Anghie, "What is TWAIL?" 31–40

In simple terms, state sovereignty means that the state may decide what to allow within its borders without interference from other states. This is a particularly strong principle which persists as one of the pivotal rules of international law. Sovereign equality implies that all states function on equal (horizontal) footing, they have the same legal status, and require the same treatment.

Article 2(1) of the United Nations Charter provides that "[t]the organization is based on the principle of sovereign equality of all its members", while – as Strydom *et al* explain–article 2(7) "protects matters that are essentially within the domestic jurisdiction of a state from outside interference."

The position is confirmed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV)).

The idea of "sovereign equality of states" under international law has been questioned by critical scholars over the years. One such is the Third World Approaches to International Law (TWAIL) movement that pointed to issues as the veto powers of the five permanent members of the UN, the resistance towards reforming the UN system, the intereference of Bretton Woods institutions in the political and economic affairs of developing states, and the role of multinational corporations in illicit financial flows from developing states (Mutua and Anghie, p 34–35).

Activity 4.1

List the elements which constitute sovereign equality in terms of the General Assembly's Friendly Relations Resolution.

Guidelines:

Strydom lists these elements on p 110 of the textbook. Please ensure that you know them.

Discuss some of the issues raised by the TWAIL movement regarding the biased and unequal structure of the international system.

Guidelines:

See Mutua and Anghie (pp 31–38).

4.3 GOOD FAITH

Study

- Study Strydom, Chapter 4, pp 110–113

In terms of article 2(2) of the United Nations Charter, '[a]ll members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in the present Charter'. Thus, UN members must fulfil their mutual undertakings and resposnibilities in a spirit of co-operation.

There have been a number of instances where the principle of good faith has been put into practice (as discussed in your textbook). Some of them include:

- In *Conditions of Admission of a State for Membership in the United Nations* ICJ Rep 1948, the court stated that article 4 of the UN Charter does not forbid the taking into account of any factor not explicitly mentioned therein, provided that the factor in question can be "reasonably and in good faith" connected to the conditions laid down in article 4"
- In terms of the VCLT, all treaties must be performed in good faith and the same principle applies to treaty interpretation.
- In *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* ICJ Rep 1955, 67 it was observed that "the Union of South Africa is duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter…"

4.4 PEACEFUL SETTLEMENT OF DISPUTES

Study

- Study Strydom, Chapter 4, pp 113–115

There are a number of important UN Charter provisions, which you must study, alongside with the explanation found in Strydom *et al.*

Please take note that article 2(3) of the UN Charter obliges states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

Article 33(1) (Chapter VI of the UN Charter), provides that the parties to a dispute which, if continued, is likely to endanger international peace and security, must seek a solution

by (amongst others) negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement.

In terms of article 35 (1): "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in article 34, to the attention of the Security Council or of the General Assembly" (which refers to a situation, which might lead to international friction) and according to article 37:

(1) Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
(2) If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Please remember that Chapter VI of the UN Charter deals with a peaceful settlement of disputes and the recommendations by the Security Council carry the same weight as General Assembly resolutions – in other words they are not binding. This is based on article 25 of the Charter which requires all members of the UN to follow *decisions* (not recommendations) of the SC.

If the Security Council finds that a threat to international peace and security does exist, it may act under Chapter VII of the Charter (discussed in the following learning unit).

4.5 PROHIBITION ON THE USE OF FORCE

Study

- Study Strydom, Chapter 4, pp 115–119

The well-known provisions of article 2(4) are that '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations', and as Strydom *et al* point out, this is one of the 'cornerstones of the modern international legal order.' The prohibition has been cited as the best-known example of an *jus cogens* norm.

Activity 4.2

South Africa, USA and Angola meet in Durban to conclude a treaty. The treaty provides that, if it at the end of six months, the government of Russia has not changed its internal politics fundamentally, South Africa, USA and Angola will jointly attack and overthrow the government of Russia, and install a new democratically-elected government. Analyse the validity of this agreement.

Feedback

The treaty cannot be valid because it violates what is probably the only generally accepted rule of jus cogens, the prohibition on use of force, enshrined in art 2(4) of the UN Charter.

You will also recall that in terms of article 53 of the VCLT: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation [deviation] is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

An interesting question which arises in this context is whether the term 'use of force' is wider than the term 'war'. Take note of the ICJ's observation in the Nuclear Weapons case:

> *If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notion of 'threat' and 'use' of force under article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal…the threat to use such force will likewise be illegal.*

Secondly, please bear in mind that the threat or use of force must be against the territorial integrity and political independence of another state, which Strydom et al define as 'the totality of the rights a state posseses with regard to its territory and people'.

Activity 4.3

On 2 May 2011, the United States of America (USA) entered Pakistani territory, without authorisation, and killed Osama bin Laden in his home. From reports, Bin Laden was unarmed when he was shot and killed by members of the American special forces. Evaluate the actions of the United States.

Feedback

Since Pakistan did not give its consent for the operation, the actions of the US were in breach of the provisions of article 2(4) of the UN Charter, and a violation of Pakistan's sovereignty and terrirorial integrity. As to whether the actions of the US could have been justified as a retort or self-defence is something you can consider after delving into the following learning unit which is dedicated to the enforcement of international law.

Lastly, we should point out that in the context of artcle 2(4), the use of force referred to, is armed force (rather than – say – economic force). Broader formulations of the 'prohibition of interference' principle is found in the United Nations Friendly Relations Resolution (where reference is made to the use of economic, political, or any type of measures for purposes of coercion). Another interesting example is found in the 1948 OAS Charter which prohibits 'not only armed force, but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.'

4.6 RESPONSIBILITY OF STATES AND INTERNATIONAL ORGANISATIONS

Study

- Study Strydom, Chapter 4, pp 119–159

Some preliminary remarks

A state may incur responsibility towards its own subjects. This would usually be dealt with in terms of national law. If, for example, a South African police officer on duty unlawfully detains and assaults a person in South Africa, the victim's remedy will lie in South African law. If, however, that same police officer behaves in such a manner towards a German national, it may very well become an issue of contention between Germany and South Africa, *i.e.* an international law dispute (and soon you will understand why). To reinforce this distinction, let us give you another similar example.

Suppose the South African government expropriates a South African's farm under a land redistribution policy. The South African will have to be compensated in terms of the applicable South African law, not in terms of international law. If, however, the government nationalises a farm belonging to a Frenchman without paying him compensation, it may expose itself to a claim in terms of international law. In both these examples, the violation of the foreigner's rights are considered to be international law matters – not because the state has violated the foreigner's rights *as an individual*, but because it has violated the foreign state's right in its national. For all states have not only an interest in the well-being of their own nationals, they have a *legal right* to have their national treated in accordance with internationally accepted standards of behaviour. The state who injures the foreign national has therefore breached international law. By doing so, it will incur liability.

State liability arises when one state violates international law in its dealings with another state.

State liability is the consequence that results from a disturbance of the equilibrium in international relations between two states, or between a state and the international community as a whole. International law is called into play to restore the balance.

The phrase "violation of international law" is one which you are already familiar with. You should know that such violations result either from the breach of a treaty provision, or the non-compliance with a rule of customary international law. In the case of a treaty, things are fairly simple – much the same as municipal law breach of contract. A customary rule is, however, a different matter. Here a distinction is drawn between obligations 'essential to the general interests of the international community' and obligations which are less far-reaching. The former are regarded as international crimes; the latter as international delicts.

In this leraning unit, we will study the circumstances (and consequences) of a state's breach of a customary international law rule, *i.e.* the commission of "international delicts".

Responsibility of states

Please ensure that you understand the distinction between direct and indirect state liability.

Direct state liability

A state is directly liable when it (obviously acting through its agents) violates an international law obligation it owes to another state. This may be, for example, by violating the territorial sovereignty of another state (seizing a person in the foreign state without permission); damaging its property (shooting down a foreign state's aircraft); or injuring its diplomats (holding them hostage, torturing them, etcetera).

Indirect state liability

A state will be found to be indirectly liable, if:

- the state injures the person or property of a foreign national within its territory (remember the two examples at the start of this learning unit?); or
- the state does not itself act in the positive sense, but fails to prevent the harmful act, or fails to minimise the harm done to the "victim".

But if a claim is instituted in an international forum for injury to an individual, is this not perhaps a contradiction of our earlier claim that the individual is not a subject of international law? The answer is to be found in the *Panevyezys-Saldutiskis Railway Case* 1939 PCIJ Rep Ser A/B No 76, where the court explained that:

> [I]n taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, the right to ensure in the person of its nationals respect for the rules of international law.

You may be wondering why you need to distinguish between the two?

There is no difference in the *result* of direct or indirect liability: If a state is liable, it must remedy its wrong. The difference, however, lies in the fact that before a state may assert a claim for one of its nationals as a result of injury in another state, that national must first exhaust available local remedies. In the case of direct liability, the state need not exhaust local remedies.

In order to understand the different types of liability better, let us have a look at facts of the *Tehran Hostages* case. It will also offer an interesting example of how a state's liability may change as circumstances develop.

Event and state action	**Iran's liability**
Iranian students stormed the US embassy in Tehran and took a number of diplomats and civilians from various nations hostage.	None: Iran cannot be held liable for the private actions of its citizens.

Having become aware of the hostage situation, the Iranian government did not do anything to assist the hostages (omission).	Indirect liability: Based on failure to prevent further harm to the embassy and its personnel.
The Iranian government *supported* (positive action) the students' actions	Direct liability: Based on the violation of the customary law obligation to protect embassy and its personnel.

Obviously, a state cannot itself act; the actual physical action must be performed by some person. If you look at the *Iran Hostages* case you will see that the state was initially not liable for the original act of the students but was later in fact liable. What, then, is the basis on which a state can be liable for certain acts, yet not be liable for others?

This brings us to the principle of imputability, or 'attribution'.

Imputability is the process by means of which certain acts performed by individuals are ascribed to the state – they are taken to be acts by the state itself.

A state will not be liable for each and every wrongful act committed by its nationals. For a state to be liable the actor must be a state organ, or an individual acting in his capacity as an employee of the state.

There must be a sufficient *nexus* between the actor and the state before the state will be held liable.

In principle all state organs and officials may incur liability for the state, where they act in their official capacity. This applies to all branches of the state: the legislature, the judiciary, and the executive including both local and central authorities.

As we saw in the *Iran Hostages* case, however, where the acts of an individual are accompanied by an act or omission by the state, the state may indeed incur liability. The most common forms of forms of this act or omission are:

- where the state encourages individuals to attack foreigners;
- where the state fails to take 'reasonable care' to protect foreigners;
- clear failure to punish the individuals;
- denying a foreigner access to the courts to claim redress;
- where the state obtains an advantage from the illegal act of the individual;
- where the state expressly ratifies the act of the individual;

Activity 4.4

X is a member of an extremist right-wing group wanted in South Africa to face charges of terrorism. Feeling that his arrest is imminent, he flees to Swaziland where he settles. The Swazi authorities are aware of his presence in the country and allow him to remain on a temporary residence permit. There is a valid extradition treaty between South Africa and Swaziland.

The South African police officer in charge of the case approaches his Swazi counterpart and asks if he can enter the country to capture X. The Swazi official refuses, saying that the correct procedure under the extradition treaty should be followed. The South

African officer conveys this news to his men and tells them that they may not seize X in Swaziland.

Despite these instructions, A and B, two constables, enter Swaziland one night in their police vehicle and in uniform, grab X and bring him back to South Africa where he is arrested and charged.

Analyse the facts given and discuss fully whether South Africa has incurred liability towards Swaziland and, if so, what form this liability takes and on what basis it rests.

Would your answer differ if A and B were brothers whose father had been murdered by X? They entered Swaziland on tourist visas, ostensibly to play in a golf tournament at the Royal Swazi Sun and, when they grabbed X, they were in civilian clothes.

Feedback

Since a state cannot itself act, the actual physical act must be performed by an individual acting on behalf of the state. South Africa can violate international law, but the actual deed must be performed by an individual (or organ). This is where imputability enters the picture.

The cardinal element of imputability is the capacity in which the person or organ acts. The state is responsible only for the acts of its officials or organs. There must be a link – a nexus – between the person/organ acting and the state. Simply put, if X walks down the street and throws a cricket ball through my neighbour's window, it is none of my business – and not my responsibility. If, however, my son does the same thing, it is very much my responsibility. The basis for this responsibility is the relationship between the individual causing the damage and me.

The state is responsible in exactly the same manner for violations of international law by its officials/organs or individuals for whom it accepts responsibility. An official is, of course, also an individual and each case must therefore be judged on its own merits. In terms of the given facts, police officers are public officials. Because of their actions, South Africa has violated international law (by the abduction and violation of Swaziland's sovereign territory) and will therefore incur direct liability towards Swaziland.

In 1987 in Nduli *it was argued that the police officers in similar circumstances had acted beyond the scope of their duties and that the state therefore could not be held liable for their actions. This argument was upheld by the court. In international law terms, the reasoning is not sound. Although the police officers had exceeded the scope of their duties, they had acted as officials of the state and the state had to be liable. In* Ebrahim *in 1991, on similar facts, the court held that the state had to approach the court with clean hands and refused to exercise jurisdiction in the matter.*

If the two policemen acted as private individuals, ostensibly as tourists to play in a golf tournament, wearing civilian clothes, the state would not be liable because there is not a sufficient nexus between them as private individuals and the state.

The law of State Responsibility is contained in the 2001 International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('Draft Articles on State Responsibility'). Study Strydom et al pp 120–121 and pay careful attention to the concept of wrongfulness (arising where a legal duty has been breached), and the concept of attributability (on which we briefly touched on above).

There are various circumstances in which the question of attributability may arise:

(i) Responsibility for the conduct of state organs pp 121–124

In terms of article 4(1) of the Draft Articles on State Responsibility, "[t]he conduct of any State organ shall be considered as an act of stateunder international law, whether the organ exrecises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or a territorial unit of the State."

This should not come as a surprise, considering that the conduct of an organ of state is regarded as an act of this state in terms of the rules of customary international law. And as it was confirmed in the Youmans Claim *(US v Mexico, 1926), the decisive factors to consider here are whether the person acted in official capacity and while on duty (see also Article 7 of the Draft Articles on State Responsibility), although distinguishing between acts done in private capacity and acts committed in official capacity can be tricky, as was illustrated by the* Mallen *case (United Mexican States v USA, 1927).*

Liability as a result of a failure to act can also arise (see Strydom's discussion of Albania's omission in the Corfu Channel *case) and Iran's liability in the Tehran Hostages case.*

(ii) Responsibility for the conduct of non-state entities exercising elements of governmental authority (see Strydom p 124)

This is issue is governed by article 5 of the Draft Articles on State Responsibility, and concerns the question on whether the actions of entities such as parastatal entities can result in state liability. The answer is 'yes', provided that there was some exercise of governmental authority.

(iii) Responsibilty for the conduct of a private person or a group of persons (Strydom pp 124–129)

In terms of article 8, for liability to arise, the private person(s) must have been acting on the instructions, or have been under the control of, the state in question.

Pay careful attention to the Bosnia Genocide case (where it was held that it is not enough for the instructions to be of a general nature); the Nicaragua case (where 'effective control of the military and paramilitary operations' was required) and the Tadic case (where the ICTY used the 'overall control test').

(iv) Responsibility for the conduct and insurgents and insurrectional groups (Strydom pp 129)

Generally, a state cannot be held liable for the acts of the insurrectional movement, because the latter has its own structures and organization. However, should that movement become the government of the state, then its actions will be considered to be the actions of that state under international law (article 10 of the Draft Articles on State Responsibility).

(v) Attribution based on subsequent acceptance or approval of a wrongful act (Strydom p 130)

This situation is governed by article 11 of the Draft Articles on State Responsibility and is illustrated by the Tehran Hostages case discussed above.

Activity 4.5

In the *Nicaragua case (Nicaragua v United States of America),* among other issues, the International Court of Justice (ICJ) was tasked with deciding whether the extent of support that the United States lent to the Contras (a militia group which at the time actively engaged in hostilities with the government of Nicaragua) was of such a nature that alleged violations by the Contras could be imputed/attributed to the United States. On this issue the ICJ held:

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed [para. 115].

Write an essay in which you discuss the following two issues: 1) what the potential implications would be should the conduct of the Contras be imputed/attributed to the United States; and 2) how the test of such immutability/attribution, expressed as the "effective control" test in the *Nicaragua case,* has developed in international law, and what the preferred test or standard is at present.

Feedback

If the conduct of the Contras can be imputed to the USA, the latter will incur liability under international law.

In your answer, you should discuss the following:

- *For a state to be liable there must be a sufficient link between the person/ entity acting and the state. The actors here would include state organs and whether they act in their official capacity. Converseley, the acts of an individual acting acting in a private capacity will be difficult to be attributed to the state. However, as we saw in the* Iran Hostages case, *where the acts of an individual are accompanied by an act or omission by the state, the state may indeed incur liability (do you remember what the most common forms of omission are?)*
- *Discuss the* Genocide Case *(Bosnia v Serbia) (2007), where the Court stated : 'One of the cornerstones of the law of state responsibility…is that the conduct of any state organ is to be considered an act of the state under international law and therefore gives rise to the responsibility of the state if it constitutes a breach of an international obligation of the state'.*
- *Discuss article 4(1) of the Draft Articles on State Responsibility.*
- *Explain that the conduct of a person or entity not an organ of the state, but authorized to exercise elements of governmental authority, can be accepted as an act of the state. Furtehrmore, a state is responsible for acts performed by officials within the scope of their employment.*
- *Liability ensues even in the case of acts committed* ultra vires. *In this regard, article 7 of the Draft Articles on State Responsibility provides: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions" (as was illustrated by the* Youmans Claim*).*
- *As far as SA case law is concerned, you may recall that in* Nduli v Minister of Justice *the court held that the South African state could not be held responsible for an arrest carried out by the South African police in Swaziland (since the arrest took place contrary to superior instructions), however in* S v Ebrahim *it was held that the state would incur*

responsibility for an abduction by 'instruments' of the state (aven though the abduction had not been specifically authorised).

- *Article 8 provides: "The conduct of a person or group of persons shall be considered an act of a State under the international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."*
- *In this regard, you should discuss the degree of control which ought to be exercised before liability can ensue. Case in point is the given* Nicaragua case. *The ICJ held that while the United States was responsible for the 'planning, direction and support' given to the contras, not all of their was attributable to the USA (as is evident in the quoted passage).*
- *This approach was seen as too strict and therefore criticized by the ICTY in* Tadic*: where the Tribunal was of the view that what was sufficient was an 'overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.'*
- *The* Tadic *approach, however, was rejected in the* Genocide Case (Bosnia v Serbia) *where according to the ICJ, such a test had 'the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of state responsibility: a state is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.*

The next question, which we must consider is what are the consequences of an internationally wrongful act? In this regard, you must study Strydom pp 131–134.

The recalcintrant state must cease its wrongful activity (the act or omission responsible for the breach) and in terms of article 31 of the Draft Articles on State Responsibility, it must make full reparations. Those can take the form of restitution, compensation or satisfaction.

One category of legal consequences deserve special mention: those that arise as a result of the breach of a peremptory norm of international law (and here you must familiarize yourself with the concepts of erga omnes *(obligation owed to the international community as a whole) and* jus cogens *(a norm from which no derogation is permitted). The latter would seem to include the prohibition of genocide, slavery, aggression, apartheid and torture. What we want to emphasise here is that in instances where those acts occur, third-party states are obliged to bring an end to the breach by lawful means, and to refrain from recognizing a situation which was brought about as a result of the breach. In this regard, see the examples provided by Strydom concerning the* South West Africa/Namibia case *and the* Israel Wall case*.*

Finally, you have to understand that in order for a state to seek redress, it must have the necessary locus standi*. The state must demonstrate that it has a sufficient legal interest in the dispute: a state must be a beneficiary of an international obligation in order to have the right to enforce it. Study pp 137–140 of your textbook and pay careful attention to the question of how 'legal interest' has been defined by the ICJ.*

Activity 4.6

South Africa and Zimbabwe have concluded a bi-lateral treaty in terms of which the two states allow one another's aircraft to fly over and into one another's territory. Alarmed

by the ever deteriorating human rights situation in Zimbabwe, which South Africa now regards as approaching the proportions of genocide, but certainly as gross violations of the human rights of Zimbabwean citizens, South Africa bans all Zimbabwe's rights to fly within SA airspace. Zimbabwe claims that South Africa, through violating an international obligation imposed by treaty, has incurred liability towards Zimbabwe for the losses it has suffered.

South Africa claims that although it has breached a treaty obligation, this is justified by Zimbabwe's far more serious violation of an international norm, owed to all nations.

Discuss the validity of the claims made by both South Africa and Zimbabwe.

Feedback

The ILC Commentary on article 40 of the Draft Articles on State Responsibility provides that, inter alia, *the prohibition of genocide and torture are examples of peremptory norms of general international law. Articles 40 and 41 of the Draft Articles on State Responsibility stipulate that states must cooperate by lawful means in order to bring an end to the breach of such obligations. In addition, states "shall not recognise as lawful a situation created by such a serious breach". A serious breach of an obligation occurs in situations in which the responsible state has systematically failed to fulfil its obligation. Article 49 (dealing with countermeasures which may be taken by an injured state) states that its provisions do not prejudice the right of a state (not necessarily an "injured" one) to take lawful measures against another state that has breached an obligation owed to the international community as a whole. The purpose of such measures is to achieve a "cessation of the breach and reparation in the interest of the injured state or the beneficiaries of the obligation breached".*

If Zimbabwe's practice of systematically violating human rights is indeed found to qualify as a serious breach of a peremptory norm of general international law, then South Africa will be justified in breaching the treaty obligations, on the basis of the provisions of articles 40, 41 and 49. History is full of examples, when states, which have not been directly injured by another state's unlawful practice, have taken measures in order to stop the violation. A prime example is the conduct of the international community, or rather members thereof, against apartheid South Africa. For example, in 1986 the US violated the US-South Africa Aviation Agreement and suspended the landing rights of SAA on US territory in its efforts to compel South Africa to abolish the system of apartheid.

Claims on behalf of nationals and legal entities

Study Strydom, pp 141–149 carefully. Pay attention to the case law discussed therein, and make sure that you know it.

What you will notice is that in this section of the work, we are discussing the indirect responsibility of states, which we defined at the start of this learning unit. A state incurs indirect reponsibility when it violates the rights of foreign individuals or entities. Therefore, we are looking at the other side of the coin: When may the acts of a state against a foreign individual within its territory, give rise to liability vis-à-vis *the individual's state and when may that state act against the offending state?*

Obviously there must be some nexus *(connection) between the individual and the state which seeks to protect him. This connecting factor is found in the nationality of the individual concerned.*

Before a state can act on behalf an individual who has suffered as a result of an international wrong in the territory of another state, the individual must be a national of the state. Nationality is generally in itself a sufficient nexus *but not invariably so. Problems may arise in the event of multiple-nationality.*

The standard case in this regard is the Nottebohm case *1955 ICJ Rep – make sure that you understand what was decided here.*

Make sure that you are able to establish (and argue) the nationality of both natural persons (you and me) and legal persons (companies, corporations, trusts etc).

OK, we have now established two things:

- *There has been a violation of international law (in one of its forms)*
- *The person who has suffered has the nationality of state who is asked to act/ wishes to act against the violating state.*

There are two things we must now investigate:

- *Does the state have an enforceable duty to act?*
- *What conditions must be met before it acts?*

The rules related to the exercise of diplomatic protection are contained in the 2006 Draft Articles on Diplomatic Protection.

Here, diplomatic protection is defined as 'the invocation by a State, through diplomatic action or other means of peaceful settement, of the resposnibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to implementation of such responsibility'.

It must be remembered that in terms of international law, the right belongs to the state of the injured individual, and before a state may intervene on behalf of its national, all domestic remedies must have been exhausted. See in this regard, the discussion in the Mavrommatis Palestine Concession case.

However, even though there is no duty in international law to act on behalf of an individual, there may very well be such a duty in terms of domestic law. In the context of this question, study the analysis of Kaunda and Von Abo *very carefully. Make sure that you know and understand these judgments as they have been discussed in you study material. Now, test your knowledge by completing the following activities:*

Activity 4.7

Through an analysis of South African case law, discuss fully what is ment by diplomatic protection, when the need for this protection may arise, what forms the protection can take; whether the state can be compelled to render such assisatance, and if so–the extent of this obligation. Lastly, assess whether the South African approach is in line with contempory international law.

Feedback

A state has a right to protect its nationals abroad who have been injured by the actions of the foreign state. The state may take up the case of its subject by resorting to diplomatic action, or international judicial proceedings. The cornerstone of this right is that an injury to a national is considered to be an injury to the state (Panevyezys-Saldutiskis Railway Case). *Therefore, under international law, the right of diplomatic protection vests in the state. The state is not under any duty to exercise its right. While the domestic laws of a state may impose such obligation, international law does not.*

The interesting question is whether South African law imposes such an obligation on the South African government. In this context we shall consider the cases of Kaunda, Van Zyl and Von Abo.

The facts in Kaunda v President of the Republic of South Africa *2005 (4) SA (CC) may be summarised briefly as follows: a number of South Africans had been arrested in Zimbabwe and Equatorial Guinea in connection with charges relating to mercenary activities and plotting a coup against the President of the Equatorial Guinea. Those arrested in Zimbabwe feared that they would be extradited to Equatorial Guinea. All the Applicants claimed that they would not receive a fair trial in Equatorial Guinea. Furthermore, they contended that, if they were convicted in Equatorial Guinea, they would be sentenced to death. They claimed, therefore, that the South African government was under an obligation to offer them diplomatic protection.*

The court dismissed the application. The majority decision, written by Chaskalson CJ (as he was then known), recognised that international law did not oblige a state to provide diplomatic protection, but in terms of the South African Constitution, there was at least some obligation on the part of the government to provide protection to its nationals abroad. The court began by asserting that a request to the South African government for diplomatic protection was unlikely to be refused if there had been a gross violation of international human rights norms, and the evidence to that effect was clear. Should a request for diplomatic protection ever be refused "the decision would be justiciable, and a court could order the government to take appropriate action".

The court also noted that the assertion of diplomatic protection was "essentially a function of the executive" with which the "courts are ill equipped to deal". However, if the executive were to refuse to consider a legitimate request, or if it were to deal with it in bad faith or irrationally, the court could intervene. In other words, while the executive has a broad discretion when conducting foreign affairs, the courts can review such decisions on the grounds of, for example, irrationality and bad faith.

In a concurring opinion, Ngcobo J, examined, inter alia, *section 3 (the right to a common South African citizenship) and section 7 which provides that:*

(1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Ngcobo J concluded that "diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read as imposing a constitutional duty on the Government to ensure that all South African nationals abroad enjoy the benefits of public protection. The proposition that the Government has no

constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the Government's own declared policy and acknowledged constitutional duty".

The dissenting opinion of O'Regan J acknowledged that the conduct of foreign affairs is typically an executive power under the Constitution and submitted that, in the conduct of foreign relations, "the executive must be afforded considerable latitude". She suggested that the court should declare that the executive was "under a constitutional obligation to take appropriate steps to provide diplomatic protection", but that the executive itself was best placed to determine what steps it should take.

In Van Zyl v Government of the RSA *2008 (3) SA 294 (SCA) the applicants requested the South African government to extend diplomatic protection to them in their dispute with the government of the Kingdom of Lesotho. The dispute related to expropriation of the applicants' mining leases, mining rights and tributing agreements without compensation being paid to them. The contracts referred to were not internationalised. The expropriation had taken place in execution of the Lesotho Highlands Water Project. The latter was provided for in a treaty between the SA government and that of Lesotho.*

It was claimed that the applicants were entitled to diplomatic protection, because the government of Lesotho had committed an international delict. The SA government had refused the application on the grounds that no right to diplomatic protection accruing to an individual existed in international law (since, in deciding to exercise diplomatic protection, the SA state would have been asserting its own right). The applicants also contended that inaction by the SA government would lead to a violation of a number of provisions of the SA Constitution.

Ultimately, the application was dismissed. Amongst others, the applicants could not prove that Lesotho had committed an international delict, nor did they satisfy the two prerequisites for the admissibility of a claim for purposes of diplomatic protection (nationality and exhaustion of local remedies.) The court pointed out that neither international law, nor the Constitution recognised the right to diplomatic protection. The court distinguished the case from Kaunda *in that the latter concerned gross human right violations, while in the* Van Zyl case *the applicants had been expropriated and international law did not recognise the protection of property as an international human right.*

In Von Abo v Government of the RSA *2009 (2) SA 526 (T) the applicant was a South African farmer in Zimbabwe. Zimbabwe had violated his rights by destroying his property interests in many Zimbabwean farms as part of a governmental scheme of expropriation. Von Abo was not compensated and he had exhausted all local remedies. Von Abo requested the South African government to afford him diplomatic protection* vis-à-vis *Zimbabwe. The applicant claimed that he had a right to such protection in terms of the South African Constitution. Relying on the judgment in* Kaunda, *the court in* Von Abo *found that there need not be an actual refusal on the part of government to grant diplomatic protection before a court would intervene. The court stated that, in an appropriate case, a court could also come to the assistance of the aggrieved national where government 'fails to respond appropriately' or 'deals with the matter in bad faith or irrationally'. The court relied on,* inter alia, *the judgment in* Kaunda *to conclude that the state had a duty to provide assistance to the applicant.*

This was a Transvaal Provincial Division judgment (later, North Gauteng Provincial Division).

*Later, the Constitutional Court ruled that it was not necessary for it to confirm the Transvaal Provincial Division order (*in Von Abo v Government of the RSA and Others *2009 (10) BCLR 1052 (CC), so Von Abo's application went back to the High Court to establish whether or not*

the government had complied with the court's order. In Von Abo v Government of the RSA *2010 (3) SA 269 (GNP) the court found that the government had not done much until then to assist Von Abo and had thus not complied with the court's order. The court awarded Von Abo damages arising from the infringement of his rights in Zimbabwe. In 2011, the government appealed to the Supreme Court of Appeal (SCA) and the SCA disagreed with the High Court's award of damages. (We trust that you remember the SA court hierarchy and the rule that higher courts may overturn the decisions of the lower courts).*

In The Government of the Republic of South Africa v Von Abo *(2011) ZASCA 65 it was held:*

> *It is ... a completely foreign concept that one state should attract liability in terms of municipal law ...* vis-à-vis *its own national for the wrongs of another state, committed by that state in another country* vis-à-vis *the same individual. The only breach that could have occurred in the present case is that the [government] failed to comply with their duty* vis-à-vis *the respondent to act appropriately to his request for diplomatic protection .... The constitutional breach in this case, if there was one, could only have been a failure to have responded appropriately to the respondent's request for diplomatic protection.*

For the present, the individual's right to diplomatic protection remains a moot point.

Activity 4.8

On 10 March 1998, Robert McBride, a South African diplomat was arrested in Maputo in connection with allegations of gun running. He was held in a Maputo jail in an under-sized cell under appalling conditions along with 50 Mocambican detainees for some two months without charges being brought and without his being allowed to contact his legal representative or the South African diplomatic or consular representatives. Would you say that South Africa has a claim against Mocambique for the treatment of its national? Could McBride's wife compel the South African government to act on her husband's behalf?

Feedback

If you have studied this section of the work, together with our feedback to the previous activity, answering this activity should be a rather straightforward affair. Consider the following questions:

Has an international norm been violated? – Yes

What is the basis of SA's interest? – Consider the nationality of the diplomat.

Can the state be compelled to act? – Discuss the position under both international law and domestic law as we have done above.

Responsibility of international organisations

In previous learning units, we established that international organisations are subjects of international law. They are endowed with international legal personality and therefore they can act independently on the international plane. Thus, it stands to reason that they can also incur liability. The principles governing such liability are contained in the 2011 ILC

Draft Articles on the Responsibility of International Organisations and in many respects they are similar to what you have already learned in the context of state liability. Study Strydom pp 149–159 very attentively, and see if you can recognise these similarities.

Self-assessment

Discuss the approach advocated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts to the following aspects:

- *When wrongfulness will be excluded;*
- *Necessity as a ground for excluding state liability for a wrongful act;*
- *Serious breaches of peremptory norms (our old 'friends' jus cogens and obligations erga omnes*

Learning unit 5

Maintaining international peace and security: the enforcement of international law

In this learning unit we consider the following:

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5.4	Use of force	69
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Learning outcomes

After working through this learning unit, you should be able to:

- Describe the different methods of international law enforcement.
- Identify the appropriate enforcement measure and apply it to any given practical situation.
- Explain under what curcumstances use of force may be justified in international law
- Apply the relevant legal law principles in order to identify breaches of international law in situations where forcible measures have been used.
- Analyse and explain the controversies created by the use of force in international law

Prescribed study material

- Strydom (ed) International Law Chapter 5 pp 162–230
- Charter of the United Nations, 1945

5.1 INTRODUCTION

As you already know, international law prescribes rules, which its subjects must follow. It is important, therefore, to know what steps may be taken against those who do not comply with the existing norms. So what will happen if a state does not comply with the provisions of a treaty to which it is a party? We have already alluded to the fact that enforcement of public international law can be tricky in light of the fact that there is no international court, which has compulsory jurisdiction, and even when judgments have been handed down you must remember that there is no universal executive authority which can be tasked with the enforcement of these judgments. This is a consequence

of the fact that international law rules are for the most part based on consent. Thus, international law has on more than one occasion been criticized for its lack of 'effective' enforcement mechanism. Enforcement mechanisms, or measures, or procedures, do however, exist and in this learning unit we will introduce you to the most important ones. As for their effectiveness – we will let you be the judge.

5.2 PEACEFUL SETTLEMENT OF DISPUTES

Study

- Study Strydom, Chapter 5, pp 162–185

You have already come across the principle of peaceful settlement of disputes in Learning Unit IV. What this section of the work seeks to introduce you, therefore, are the methods of such dispute settlement.

Negotiation

This is a particularly attractive form of dispute resolution, because it is entirely within the control of the parties, although the ICJ has emphasised that the parties 'must negotiate with the aim of arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement.' Negotiations must be a genuine attempt to engage in discussions.

Mediation

In this instance, the states are assisted through the intervention of a third party (the mediator). The mediator is actively involved in conveying each party's proposals and ideas, and looking for a solution to the problem. Mediation is also known as 'good offices'.

Conciliation

In this instance, a commission set up for that purpose (either permanently or an *ad hoc* basis), and it assists the parties to the dispute. As Strydom *et al* explain, this is a formalised form of mediation and it is usually decided upon through a bilateral arrangement. See the prescribed textbook for a number of such treaty examples.

Inquiry

Article 9 of the 1907 Hague Convention for the Pacific Settlement of Disputes provides that where 'the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.'

An important example, is article 34 of the UN Charter, which provides that the Security Council is to investigate disputes which are 'likely to endanger the maintenance of international peace and security.'

Arbitration

Arbitration has been defined by the International Law Commission as:

> "[the] procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted."

The Permanent Court of Arbitration is a body which came into existence in terms of the Hague Conventions for the Pacific Settlement of International Disputes (1899 and 1907). Its function was to establish a body of eminent jurists (listed by various state parties to the convention) from which states could select arbitrators to settle their disputes. It continues today for state parties and obviously depends on the willingness and consent of state parties to the Convention to submit to arbitration. They must furthermore agree on:

- The identity of the arbitrators
- The content of the legal question(s)
- What rules of law would apply to the dispute (they are not necessarily rules of public international law)
- The time frame within which the award must be made
- That the award will be final and binding.

This agreement on these aspects is contained in a document and is referred to as the *compromis*.

Judicial Settlement by the International Court of Justice (ICJ)

This is an important section of the work, so please study pp 169–185 attentively and carefully. What we have provided is a short summary of the most important (albeit not the only important) issues.

The International Court of Justice is the judicial organ of the United Nations and its procedures are governed by the ICJ Statute (which is annexed to the UN Charter). The bench consists of 15 judges representing 'the main forms of civilization' and the principal legal systems of the world. The judges are elected by the General Assembly and the Security Council and they hold office for nine years. It is the court who elects the President of the ICJ. S/he holds office for three years and has a casting vote.

Nine judges constitute a quorum and all decisions are by majority vote of the judges present.

The judges are expected to recuse themselves, if they have been involved as counsel to one of the parties to the dispute, or in some other capacity. However, the mere fact that their state of origin is one of the parties will not on its own be grounds for recusal. In fact, a state may appoint an *ad hoc* judge, which is one of its nationals, to sit on the case. Belgium, for example, appointed Christene Van den Wyngaerd as a judge *ad hoc* in the *Arrest Warrant case*.

Two types of proceeding may be brought before the ICJ:

(1) Contentious proceedings where there is a dispute between two (or more) state parties. In these cases the court will hand down judgment which will be binding on the parties.
(2) Advisory opinions on questions of international law referred to it by the existing UN organs or its specialised agencies. These opinions are not binding.

Article 34 of the Statute provides that only states may be parties in cases before the ICJ, although the court may request organisations to place information before it.

Another important issue is that of jurisdiction. It is very important to remember that states must agree to the ICJ's jurisdiction. Article 36(1) provides that the ICJ will have jurisdiction in all cases

> "which states in a dispute may agree to…and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force" .

States may submit an existing dispute to the ICJ once they have reached a special agreement (*compromis*) to that effect. The court may also be able to exercise jurisdiction which is implied (*forum prorogatum*). This happens when one state has initiated proceedings and has agreed to the court's jurisdiction, while the other state has not expressed its consent, but has acted in a way from which consent may be inferred. Furthermore, articles 36(2) provides that:

> "[T]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach of an international obligation."

This article allows for states to accept the court's jurisdiction by way of declaration. It may be unconditional, but is usually subject to conditions and operates on the basis of reciprocity *vis-à-vis* certain states, on a given subject-matter and for a limited period of time. Thus, a state which has made such a declaration may bring another state (which has accepted the same obligation) before the ICJ.

Lastly, the judgments of the court are binding only on the parties involved – in other words there is no precedent system.

5.3 NON-FORCIBLE MEASURES

Study

- Study Strydom, Chapter 5, pp 185–196

Non-forcible measures can be unilateral responses, or collective measures under the auspices of an international organisation.

Countermeasures

As confirmed by the arbitral tribunal in *Air Services Agreement*, 'if a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through counter-measures'.

The countermeasure must not involve the use of force, it must be proportional to the injury suffered and must be ended once the recalcitrant state has rectified its behaviour. The rules pertaining to countermeasures are further elaborated by the ILC Draft Articles on the Responsibility of States, as discussed by Strydom *et al.*

Sanctions

In a nutshell, the term 'sanctions' in its narrow sense denotes the collective action by a group of states against the violator. For example, the injured state and its allies may collectively ban commercial activity with that state.

Sanctions, as well as boycotts and embargoes, may be recommended by an international organisation, such as the United Nations. Under Chapter VI the Security Council may address disputes which do not yet threaten international peace and security, but which are likely to do so, if they remain unresolved. Article 34 provides that the Security Council may investigate any dispute, so as to determine if its continuance is likely to endanger the maintenance of international peace and security. Alternatively, a member of the UN may bring such a dispute to the attention of the Security Council (or the General Assembly). If the Security Council has established the nature of the dispute to be such, it is empowered by article 36(1) to recommend appropriate measures or procedures in order to remedy the situation. For example, in response to the racially discriminatory policies of apartheid South Africa, a number of recommendations were adopted such as the imposition of an arms embargo, the suspension of investment in SA, or the restriction on sports and cultural relations with SA. We should also note that the Security Council may in addition address the situation by making settlement proposals (article 37).

Please remember that Chapter VI deals with a peaceful settlement of disputes and the recommendations by the Security Council carry the same weight as General Assembly resolutions – in other words they are not binding.

Chapter VII, on the other hand, makes provision for action with respect to:

- Threats to the peace

- Breaches of the peace and
- Acts of aggression.

Of its own accord, or acting after a referral by the General Assembly or a UN member, the Security Council may determine the existence of the conditions mentioned above and may make recommendations, or decide on other measures in order to maintain or restore international peace and security (article 39).

In terms of article 41 the Security Council may decide on measures such as interruption of economic relations, severance of diplomatic relations, and communications with the recalcitrant state, and may call upon the UN members to apply these measures.

At this point in time you should probably pause and reflect on the unintended and questionably ethical results, which sanctions may have on the civilian population. Read Strydom's discussion on pp 190–191 of the prescribed textbook. Similarly, there is great potential for human rights abuses in the implementation of counter-terrorism measures. A case in point is the *Kadi* saga played out before the European Court of Justice. Strydom discuss the cases on pp 192–195.

5.4 USE OF FORCE

Study

- Study Strydom, Chapter 5, pp 196–230

We have already established that the prohibition on the use of force is widely accepted to have reached the status of a *jus cogens* norm. However, there are two exceptions:

- Where there is a threat to international peace and security, and the SC has authorized the use of collective force under Chapter VII of the UN Charter, or has allowed a regional agency to do so in terms of Chapter VIII of the UN Charter;
- Where the state acts in self-defence under Article 51 of the UN Charter.

The collective security option (pp 196–199)

As the executive body of the UN, the function of the Security Council is primarily to maintain international peace and security. If a situation threatens peace and security it may be brought to the attention of the SC by:

- any member of the UN;
- a non-member who accepts the peaceful settlement provisions in the Charter;
- the GA, or
- the Secretary-General.

In terms of article 24 of the Charter, the member states grant the Security Council the primary responsibility for the maintenance of international peace and security and agree that the SC acts on their behalf when doing so. The SC must act within the parameters of the purposes and principles of the UN.

In terms of **article 41** the Security Council may decide on measures such as interruption of economic relations, severance of diplomatic relations and communications with the recalcitrant state and may call upon the UN members to apply these measures.

For example, **SC resolution 1970 (2011),** adopted in response to the revolution in Libya, provides as follows:

> *"The Security Council,*
>
> *Expressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,…*
>
> *Acting under Chapter VII of the Charter of the* United Nations*, and taking measures under its Article 41…*
>
> *9. Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories…"*

Article 42 of the UN Charter provides that if the peaceful measures resorted to under article 41 (which we have already mentioned) fail, the Security Council may take action by air, sea, or land forces. The use of such forcible measures is a last resort and must be necessary for the restoration, or maintenance of international peace and security. There is no standing military force available to the Security Council, so in effect an action taken under article 42 amounts to an authorisation by the Security Council of the use of force by member states.

For example, when Iraq invaded Kuwait in 1990, member states were authorised to 'use all necessary means' which would ensure the Iraqi withdrawal.

A more recent example is the adoption of **SC Resolution 1973 of 2011** in response to the revolution in Libya.

Thus, there are **three types of action** which the SC may undertake under Chapter VII:

- Article 40 – provisional measures (e.g. withdrawal of forces; cease-fire)
- Article 41 – non-forcible measures (e.g. economic sanctions)
- Article 42 – measures involving force

Activity 5.1

"The powers of the Security Council under Chapter VII are far-reaching." Discuss the veracity of the statement with reference to the United Nations Charter and recent developments in international law.

The information below is not a model answer, nor a comprehensive or an exhaustive one: It is simply an example of some of the issues, which you could have mentioned:

The SC has the primary responsibility for the maintenance of international peace and security, as conferred upon it by the UN member states (article 24(1)). In terms of article 25, '[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance of the present Charter,' while article 103 proclaims that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' It is thus obvious that the powers of the SC carry some significance, especially those exercised under Chapter VII since the latter may involve legally binding **decisions.** It should be noted that Article 25, which contains the obligation on member states to carry out SC decisions does not apply to Chapter VI. Chapter VI concerns recommendations, which have the same weight as GA recommendations. This question concerns powers exercised under Chapter VII only.

Chapter VII covers '[a]ction with respect to the threats to the peace, breaches of the peace, and acts of aggression' and encompasses articles **39–51**. Let us have a look at some of those provisions:

In terms of **Article 39** the SC is empowered to determine the 'existence of any threat to the peace, breach of the peace, or act of aggression' and make recommendations, or decisions as to the measures which should be taken (as per art 41 and 42) in order to maintain or restore international peace and security. You could have also discussed the question of whether the SC may adopt a resolution in terms of article 39 when there has been a serious violation of human rights within a state's territory, especially in light of the inconsistent practice of the Security Council in this regard. Mention could have been made of a number of situations, such as the Security Council's response to apartheid South Africa; the military junta in Myanmar; and the violence against civilians in Libya in 2011.

Article 40 concerns the adoption of provisional measures prior to the taking of an enforcement action (e.g.) a cease-fire.

In terms of **Article 41** the SC may call upon members to apply measures not involving the use of force in order to give effect to its decisions. These measures (also decided upon by the SC) may include 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. In practice, such sanctions have included those imposed on Rhodesia (1966-1979); the arms embargo imposed on South Africa; the 1990 economic sanctions against Iraq; the 2005 economic sanctions imposed on Sudan *et cetera*.

Article 42 proclaims that if the measures provided for in article 41 are inadequate (because the SC considers them to be so, or because they have proved to be inadequate), then the SC 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. In other words, article 42 concerns forcible measures. As Dugard (2011) explains, when the Charter was drafted, it was envisaged that such action would be undertaken by military contingents (made available to the SC by virtue of agreements with state parties) which would also be under the command of a

Military Staff Committee (in terms of article 47). However, no force was ever established under article 43. Therefore, any enforcement action, which has thus far been undertaken under this article, has amounted to action authorised by the SC. While such authorisation is an 'implied power' under the Charter, it can be problematic in that the SC does not have absolute control over the actual military actions and procedures.

Here, you could have also discussed various instances in which the SC has authorised the use of force under article 42, such the sending of armed forces to Korea in 1950's; the authorisation of the use of force against Iraq in 1991; the imposition of a no-fly zone over Ghadaffi forces in 2011.

- **Articles 48–49** proclaim that the actions, which must be taken in order to carry out SC decisions, will be taken by all member states, or only by some of them – depending on what the SC has determined. Furthermore, member states must provide mutual assistance to one another when executing the measures decided by the SC.
- Interestingly**, article 50** provides that should any state encounter special economic problems as a result of the SC measures described above, it will have the right to consult the SC 'with regard to a solution of those problems'.
- **Article 51** is the 'self-defence' provision which will be dealt with at a later stage.

While it may appear that the abovementioned powers are extensive, it should be remembered that any decision must have survived the exercise of the veto powers vested in the five permanent members of the SC. However, they may very well have their own interests to protect and thus render the SC ineffective (which was particularly true of situations, which occurred before the end of the Cold War). It should be noted that after the Cold War, the SC was able to reach consensus on taking action under Chapter VII in many more instances. (as explained by Dugard).

Lastly, you could have discussed the nature of recent SC resolutions, and their resemblance to normative legislative measures. It should be pointed out from the outset that in adopting binding decisions under Chapter VII, the SC does not 'legislate', but as Dugard points out the purpose of the SC in that context is 'to identify the conduct required of a Member State because of its pre-existing Charter obligations'. Yet, recent resolutions have the appearance of legislation: 'they are general and abstract in character; they are phrased in neutral language, apply to an indefinite number of cases and are not limited in time; they do not name states; and although triggered by a particular situation they are not restricted to it.'

You could have also discussed the possibility (and likelihood) of a judicial review of SC actions by the ICJ.

Activity 5.2

'As we have already seen, an act of aggression may trigger a decision by the Security Council to use force, and therefore its significance in the application of international law cannot be denied. Write a brief essay in which you explain how the term has been defined in international instruments and judgments.

Guidelines

Study Strydom pp 197 – 199 and thereafter discuss the following:

- Relevant provisions of GA Res 3314 (XXIX) of 1974;
- Relevant provisions of GA Res 2625 (XXV) of 1970 (Friendly Relations Resolution);
- The relevant observations of the court in the Nicaragua case (as discussed in Strydom);
- Article 5(1)(d) of the 1998 Rome Statute of the International Criminal Court, together with Resolution RC/Res.6 (adopted on 11 June 2010), which defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

Regional arrangements (pp 199–204)

Chapter VIII recognises that certain regional threats to international peace and security can best be addressed on a regional level, at least initially. Regional bodies attempting this must act within the purposes and principles of the United Nations. Security Council authorisation is required, and the SC must be kept informed of any action taken or contemplated by the regional body.

Activity 5.3

Article 4(h) of the Constitutive Act of the African Union (2000) provides as follows:

> The Union shall function in accordance with the following principles:
>
> […]
>
> (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;

Write an essay in which you consider whether such intervention in terms of Article 4(h) requires Security Council authorization. You can assume that the intervention in question qualifies as a use of force.

Guidelines:

The following points should be included in the answer:

- The general prohibition on the use of force, and the exceptions to this rule (article 51 of the UN Charter, and action authorized by the SC under Chap VII of the UN Charter) should be discussed;
- The legality of humanitarian intervention may also be discussed briefly;
- Article 53 of the UN Charter ('no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council') should be discussed, together with examples of instances where this article had not been complied with.
- Conclusion: SC authorisation must be obtained.

Self-defence (pp 204–205)

One exception to the rule prohibiting the use of force is an act carried out in self-defence. Self-defence is governed by Article 51 of the UN Charter, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." This article further provides that the self-defence measures taken by the member state must be reported to the Security Council immediately and that they shall not in any way affect the authority and responsibility the latter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The following characteristics are important:

- The act taken in exercising the right to self-defence is valid only until the Security Council acts.
- The purpose of the use of force must be clear: to defend oneself.
- The force exercised in self-defence must be proportionate to the posed threat.

Activity 5.4

On 11 September 2001, Islamic extremists flew two passenger aircraft into the World Trade Centre in New York, United States of America, destroying the heart of Manhattan and killing thousands of innocent civilian Americans. The United States retaliated by declaring "war" on terrorism and bombing Afghanistan where the leadership of the Islamic Group were living.

Assess the appropriateness of the American response in terms of the requirements for self defence.

Feedback

It is not clear whether the right to self-defence can be exercised only if an armed attack occurs (whether article 51 amounts to an exclusive and complete formulation of the right), or whether article 51 allows anticipatory self-defence (whether 'inherent right' indicates that article 51 has preserved the pre-Charter customary law definition of the right to self-defence, which would include the right to launch a pre-emptive strike). Under customary international law the right to use force in self-defence was justified if the need for it was instant, overwhelming and immediate, and there was no viable alternative action.

The attacks on Afghanistan were launched on the grounds that the Taliban government had allowed al-Qaeda terrorists to train and operate from its territory and had not taken any action against al-Qaeda after having been asked to do so by the USA. The USA therefore had reason to believe that further acts of terrorism may be directed against it.

It is true that article 51 envisages acts of self-defence against a state and not against a non-state actor such as al-Qaeda. However, it may be argued that when article 51 was drafted, terrorism was not as widespread as it is today. Secondly, the fact that the Taliban government was harbouring terrorists and had refused to take action against them leads to the conclusion that the acts of al-Qaeda were attributable to the government of Afghanistan.

Another objection to the US actions which may be harder to refute is that the so-called action in self-defence taken with a view of preventing further terrorist attacks stretched the limits of anticipatory self-defence too far, since anticipatory self-defence covers only responses to an imminent attack which cannot be prevented by any other means.

On the other hand, in defence of US actions, it must be noted that after the acts of terrorism had been committed, the Security Council adopted Resolutions 1368 and 1373 recognising the inherent right to self-defence of states and condemning the terrorist attacks. It was after these resolutions had been adopted that the USA invaded Afghanistan. Some scholars, relying on the content of the SC Resolutions mentioned above, have argued that a new subspecies of self-defence, namely self-defence against terrorism, had emerged and the attack on Afghanistan had been approved by the SC Resolutions in recognition that such a right may be exercised.

Sources of controversy (pp 207–230)

Study the prescribed section of your textbook carefully, and take note of the six set of circumstances, which the authors have identified as being controversial. Please ensure that you know the facts of the examples cited therein, and analyse the applicable law, so as to be able to explain why these situations are controversial:

Rescue of own nationals: this action, which can be seen as a violation of the UN Charter, has been defended as a right, 'flowing from the right of self-defence' in order to protect nationals from injury.

Humanitarian intervention: Humanitarian intervention by individual states has been abused in the past and is of dubious legality. However, according to some academics, when it is conducted by states collectively, *it is acceptable as being a basic rule of organised society. There is emerging opinion and practice to the effect that when a state breaches the fundamental human rights of its nationals and thus shocks the conscience of mankind, humanitarian intervention may be justified.*

There are a number of examples, one of which is the 1999 NATO bombing of Kosovo, which was said to have been conducted for humanitarian reasons. In the 2000 Kosovo Report prepared by the Independent International Commission on Kosovo it was stated as follows: "[T]he NATO campaign was illegal, yet legitimate. Such a conclusion is related to the controversial idea that a "right" of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but it may, depending on the context, nevertheless reflect the spirit of the Charter as it relates to the overall protection of people against abuse."

*And while you are studying this section, let us give you some food for thought. As you will all know the war in Libya in 2010 resulted in (amongst many others) a great number of atrocities being perpetrated against civilians. The response of the international community was forcible intervention (we touched upon that in our discussion of the powers of the Security Council under Chapter VII, remember?). In his article "Whom to Protect, Whom to Abandon" (*Time, *18 April 2011, p 27) Michael Elliott states that:*

> *"[t]he war in Libya has opened up the can of worms once more, with those on one side arguing that the international forces can prevent or end great wrongs, while others assert that intervention is based on the inconsistent application of fuzzy principles and amounts to little more than imperialism*

dressed in the cloak of bleeding-heart piety." Would you agree with him? This is not an official "activity", but if you would like to share your thoughts with us, please contact us!

The responsibility to protect is closely linked to the discussion of humanitarian intervention and the principle has been gaining widespread support. However, its implementation is not without its problems, and those were exemplified by the events in Libiya and Syria.

The war on terror: one of the many difficulties here is establishing whether the right to self-defence can be used against non-state actors; another problem is when a state makes its territory available to non-state actors and thus assists them in carrying out attacks against another state.

Cyber warfare: one of the burning questions here is whether a computer network attack in peacetime could qualify as an 'armed attack' within the context of article 51 of the UN Charter.

The blurring of peacekeeping and enforcement action: Peacekeeping is not specifically provided for in the UN Charter, but it can be inferred as being part of the powers and functions of the GA and the SC. A number of basic rules and principles (such as consent of the host state, no direct involvement in the conflict), as well as the practice of drafting SOFAs, have emerged as ways of ensuring that there are no international law breaches. However, in practice, complex situations on the ground have often pushed the limits of the peacekeeping mandates. Please ensure that you have familiarised yourself with the contents of the 'Agenda for Peace' report discussed on pp 228–229 of the textbook.

Self-assessment

State X is a developing state consisting of a majority population of the Y-race and the minority population of the X-race. Its government is to a large extent subservient to that of State Y. The X-men, a well-organised militant group operating within State X, have been planning a coup against the current government for years. The coup is successful, and in February 2016 the X-men proclaim themselves the governing authority of State X.

The new X-government institutes a strict segregation regime (apartheid) between the X and the Y-races, in terms of which the minority X-race subjugates the majority Y-race.

The X-men government also harbour very strong sentiments against State Y, and relations between the two states become hostile. In the meantime, the pro-Y counter-insurgents within State X start organising themselves for a strike against the X-men government. State Y secretly promotes the pro-Y dissidents by supplying them with weapons and training.

Analyse this situation and write a legal opinion, explaining whether State Y has violated any rules of international law, and if so, what State X's remedies would be.

Learning unit 6

Jurisdiction of states

In this learning unit we consider the following:

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Learning outcomes

After completing this study unit you will be able to:

- explain the concept of territorial jurisdiction;
- explain extra-territorial jurisdiction and the problems this causes in international relations;
- explain the various bases on which jurisdiction can be claimed;
- apply these principles to practical examples;
- recognize, identify and explain the different types of immunity from jurisdiction;
- apply the principles of state/sovereign immunity, as well as diplomatic and consular immunity to practical situations.

Prescribed study material

- Strydom (ed) *International Law* Chapter 6 pp 233–266
- Strydom (ed) *International Law* Chapter 10 pp 307–311

Recommended material:

- *Arrest Warrant of 11 April 2000 (DRC v Belgium)* 2002 ICJ Reports 3 – see also the dissenting opinion of Judge Van den Wyngaert in this regard. The case will be uploaded on myUNISA.

6.1 STATE JURISDICTION: AN INTRODUCTION

Study

- Study Strydom, Chapter 6 pp 234–236

The term 'jurisdiction' has been defined in many different ways throughout the last century which has led to some confusion and the lack of a universal definition. However, for the purposes of this learning unit, the following three points must be kept in mind when understanding state jurisdiction:

(1) State jurisdiction is divided into three distinct powers or competences which are exercised by states. These three competences are *prescriptive*, *enforcement* and *adjudicative*. What is the difference between these three? Using Strydom (pp 234–235) and paragraph 34 of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (2014 (2) SA 42 (SCA)), identify what the differences between these three are. After answering this question, it is important to take note of the fact that this learning unit will focus on prescriptive jurisdiction – that is to say the 'geographical reach of a State's laws'.

(2) Public international law is primarily concerned with criminal jurisdiction and not civil jurisdiction which is governed by private international law/ the conflict of laws. The focus in this section of the work is therefore criminal jurisdiction and not civil jurisdiction.

(3) In many cases, several states may have concurrent jurisdiction over the same person or conduct. How does Strydom explain this? Can one state claim to have more rights over a situation than another?

From the above, it should be clear that jurisdiction, for the purposes of both public international law and specifically this module, should be understood as being a state's capacity to exercise its legislative, executive and enforcement functions in a specific territory.

6.2 DIFFICULTIES IN IDENTIFYING JURISDICTIONAL RULES

Study

- Study Strydom Chapter 6 pp 236–240

6.2.1 The challenge of the *Lotus* case

The jurisdiction of states is primarily governed by customary international law and there is not one treaty dedicated to the subject. This means that state practice plays a major role in defining the parameters of jurisdiction. At this point, it may be worthwhile to go back and remind yourself of the requirements for customary international law as discussed in Learning Unit 3.

Almost every discussion of jurisdiction in international law starts with reference to the *Lotus* case. In this case, a French ship, the *Lotus*, collided with a Turkish ship, the *Boz-Kourt*, on the high seas. The latter ship sank and a number of crew members and passengers lost their lives. The *Lotus* picked up the survivors and went to port in Turkey. In the Turkish port, the officer on watch aboard the *Lotus* at the time of the collision was arrested, tried, and convicted of culpable homicide. France objected to Turkey's exercise of jurisdiction and the dispute was referred to the Permanent Court of International Justice. Before the Court, France argued that only the flag-state of the *Lotus* (France) had jurisdiction over acts committed aboard a vessel on the high seas, while Turkey claimed that it had jurisdiction by reason of the fact that the effects of the collision had been felt on a Turkish ship, which has to be viewed as being part of Turkish territory.

In its judgement, the Court accepted the territorial limits placed on a state's enforcement jurisdiction but went further and provided states with a wide jurisdictional discretion – effectively allowing for a state to exercise 'jurisdiction in its own territory, *in respect of any case which relates to acts which have taken place abroad*'. This obviously sparked considerable controversy. Why do you think this is so? What impact could very wide powers of jurisdiction have on the relationships between states? Take note of the discussion in Strydom (pp 237-238) regarding the different views on the *Lotus* judgement and form your own opinion.

6.2.2 The problem of state practice and *opinio juris*

Given the uncertainty and conflict regarding the judgement in *Lotus*, state practice has differed in how jurisdictional rules are applied – adding another problem to jurisdictional disputes. Why does state practice present a problem? As Strydom highlights, when states exercise jurisdiction, they may take into account both international and municipal law, as well as 'extra-judicial' considerations. This means that a state could choose to exercise or not to exercise jurisdiction based on their own domestic laws or policy considerations. So the question then comes up, does the choice to exercise jurisdiction, or not, really reflect state practice or *opinio juris* or does it merely reflect the domestic concerns (legal or otherwise) of a state? Ensure that you read and understand the cases emphasised in Strydom as well as how state practice regarding jurisdiction is problematic.

6.3 STATE JURISDICTION UNDER SOUTH AFRICAN LAW

Study

- Study Strydom Chapter 6 pp 240–242

Since 1994, South African courts have seemed to favour a restrictive (rather than a permissive) approach. What is this difference between these two approaches?

6.4 THE SIX BASES OF JURISDICTION

Given the above discussions, six bases (also referred to as theories or grounds) of jurisdiction have developed and are asserted, by states, as lawful under international law. When studying the different grounds for jurisdiction in Strydom, take note of the distinction that is made between territorial and extraterritorial jurisdiction. What follows below is a very brief discussion of the theories of jurisdiction and has to be supplemented by the information found in Strydom since, alone, the discussion is insufficient.

6.4.1 The principle of territoriality

A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts. See Strydom (pp 242–246).

6.4.2 The nationality principle

A state has jurisdiction over its own nationals wherever they act. See Strydom (pp 246–247).

6.4.3 Passive personality

Where a foreigner violates rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner. This basis is often used in instances of terrorism. See Strydom (pp 247–248).

6.4.4 The protective principle

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state. See Strydom (pp 248–249).

6.4.5 The effects principle

A state has jurisdiction over acts performed outside its territory which have an effect in the territory. See Strydom (pp 249–250).

6.4.6 Universal jurisdiction

This is the most controversial grounds on which to exercise jurisdiction. In theory, this ground of jurisdiction allows any state to claim jurisdiction over international crimes – such crimes include piracy, war crimes and crimes against humanity, genocide and human trafficking. With regards to terrorism, South Africa has enacted the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004. This Act gives effect to South Africa's international obligations in respect of the suppression of terrorism. See Strydom (pp 250–252).

6.5 SPECIALISED JURISDICTIONAL REGIMES

Study

- Study Strydom, Chapter 6 pp 253–260
- Study Smith, pp 601–602, 605–607

Certain spheres of human activity extend well beyond the boundary of a state and the question then arises as to which states will have jurisdiction when disputes arise. For this reason, this section of Strydom deals with the specialised regimes that apply at sea, in Antarctica and in outer-space.

Dealing with such specialist regimes in detail is beyond the scope of this module. However, you are encouraged to summarise each regime in Strydom and have a basic understanding of how jurisdiction in these areas is regulated and why they are classified as being 'specialist'.

Activity 6.1

On 9 January 2015 Amnesty International reported on the massive escalation of violence perpetrated by the Nigerian-based non-state group Boko Haram:

> The attack on Baga and surrounding towns, looks as if it could be Boko Haram's deadliest act in a catalogue of increasingly heinous attacks carried out by the group. If reports that the town was largely razed to the ground and that hundreds or even as many as two thousand civilians were killed are true, this marks a disturbing and bloody escalation of Boko Haram's ongoing onslaught against the civilian population.

Abubakar Shekau, who is from Niger not Nigeria (they are different countries) is the leader of Boko Haram and the United States designated Boko Haram a terrorist organization during November 2013.

In addition to the above mentioned facts, assume the following facts for purposes of this question: many of the victims of the recent violence perpetrated by Boko Haram are nationals of Cameroon. Furthermore, on the morning of 8 January 2015, Boko Haram members began firing mortars (explosive shells) across the border into Chad, killing many villagers on the Chadian side of the border. These attacks all occurred under the direction of, and in the presence of Abubakar Shekau.

On the basis of the above facts discuss whether and what the basis would be, the following states can exercise criminal jurisdiction over Abubakar Shekau:

(a) Nigeria;
(b) Niger;
(c) United States;
(d) Cameroon;
(e) Chad; and
(f) South Africa.

Include in your answer a discussion of jurisdiction in the more general sense.

Guidelines:

Define 'jurisdiction' and discuss the facts and judgment of the *Lotus* case.

Define and describe each base of jurisdiction (as discussed above)

Identify the bases applicable to each state:

(a) Nigeria– territoriality/universality
(b) Niger– nationality/objective territoriality (effects)/universality
(c) USA– universality
(d) Cameroon– passive personality/universality
(e) Chad – objective territoriality (effects)/universality
(f) South Africa – universality

6.6 IMMUNITY FROM STATE JURISDICTION

Under the principle of immunity, international law prevents a state from exercising jurisdiction over a matter or person, that will ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (Minister of Foreign Affairs or Head of State for example) or the nature of the conduct in question. In pre-colonial Africa, there were officials of government engaged in foreign affairs. These officials often enjoyed immunity against arbitrary detention (Smith, p 605–607). International law regarding immunity has ancient roots and, broadly speaking, has two aims:

(1) To ensure the smooth conduct of international relations (see Strydom's discussion in this regard and this aim's connection to personal/diplomatic immunity); and
(2) All states are equal and no state should be entitled to exercise jurisdiction over another state's conduct (*par in parem non habet imperium*).

6.6.1 Personal and functional immunity

Generally speaking, the representatives of foreign states are entitled to personal immunity or functional immunity or both when they are in another state. What is the difference between personal and functional immunity? Personal immunity is provided under both treaty law and customary international law and provides immunity for persons of a certain office while they carry out important representative functions. Functional immunity, on the other hand, refers to conduct which is carried out on behalf of a state and, unlike

personal immunity, does not attach to *all* conduct carried out by state officials. You *must* read and understand this section in Strydom and ensure that you know the difference between functional and personal immunity. Additionally, know how immunity (and which type) is given effect to in South African law.

Diplomatic and consular immunity are further discussed in Strydom (ed) *International Law* Chapter 10 pp 307–311. These four pages are prescribed and must be studied in this context.

6.6.2 Immunity and international crimes

For this section, ensure that you understand how either functional or personal immunity is affected by international crimes. In other words, if functional immunity does not traditionally apply to international crimes, what is the position regarding personal immunity? In answering this question, make yourself aware of both the discussion in Strydom (pp 263–264) as well as the decision in the *Arrest Warrant* case where the court states that:

> 'It has been unable to deduce … that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction …'

How has this decision impacted on state practice?

This is an important section of the work and you must work through Strydom (pp 263–265) and ensure that you understand the intricacies that are at play.

Activity 6.2

Temba is an artist from Pretoria who concludes an agreement with the Government of Goldava. The agreement stipulates that he will paint a portrait of the wife of the Goldavian Ambassador to South Africa (Mrs Nip), which is to be hung on the wall of the Ambassador's office and that in turn he will be paid R10 000.00 deposit before he starts working and R25 000.00 when his work is completed. He receives the deposit in good time. A month later the portrait is finished, and he shows it to Mrs Nip at the embassy. Mrs Nip is not satisfied with the way in which she has been depicted by Temba. Temba quietly insists that the portrait is life-like and as requested. Mrs Nip loses her temper and throws a paper weight at Temba. Temba is seriously injured and taken to hospital. When his condition improves he approaches you for legal advice. With reference to authority, advise Temba whether Mrs Nip can be arrested and charged with assault; whether the embassy premises can be searched for the paper weight which was allegedly used in the assault, and whether Temba can institute an action in a South African court claiming the remaining R25 000.00 from the Goldavian Government.

Feedback

Assault

In terms of section 3(1) of the DIPA, the Vienna Convention on Diplomatic Relations 1961 applies to all diplomatic missions and members of such missions in the Republic.

Diplomatic premises and the the person of the diplomat (including his family) enjoy certain immunities:

- *The diplomatic premises may not be entered by the host state without the permission of the ambassador.*
- *A diplomat may not be arrested or detained (it is a criminal offence to do so).*
- *Premises, furniture, property, cars, etc., may not be searched, requisitioned, attached or sold in execution.*
- *He/she is absolutely immune from criminal jurisdiction.*
- *Embassy archives, correspondence, post bags, etc., may not be opened, searched, detained.*
- *He/she is immune from civil jurisdiction unless: real action for immovable property held in personal capacity; matters of succession in private capacity; professional or commercial activities outside of official functions.*
- *This immunity extends to the diplomat's family, therefore Mrs Nip enjoys such immunity.*

Contract with the Government

The provisions of FSIA apply here. This situation would fall under the commercial transaction exception to sovereign immunity.

If the restricted immunity theory is applied, the contract will be seen as a normal commercial transaction–in concluding the contract, Goldavia was not performing a public governmental function, but was merely acting as a trader in the marketplace. It would, therefore, not succeed in raising immunity and Temba would get his money.

Self-assessment

From a practical point of view, this learning unit is very important. Strydom's exposition is fairly detailed, and you are required to work through the work and ensure that you know and understand it. The following questions are in no way inclusive of the whole learning unit but will add to your understanding of the work.

(1) Mr Naughty, a South African, and Ms Pickpocket, a British national, have set up home together in Liverpool (England). In order to finance their lavish lifestyle, they have devised a profitable criminal scheme. They travel between England and South Africa, robbing their fellow passengers. Mr Naughty is caught stealing travellers' cheques from a fellow passenger on board a South African Airways flight between London and Johannesburg. At the time of the theft, the aircraft is flying over Kenya. Ms Pickpocket, on the other hand, is caught stealing a pearl necklace from an old lady on a British passenger liner sailing between Southampton and Durban. At the time of the theft, the ship is on the high seas. Explain, referring to case law, whether a South African court will have jurisdiction over Mr Naughty and Ms Pickpocket, and, if so, on what basis.

(2) Write a legal opinion on universal jurisdiction, explaining its development, the controversies surrounding its application as well as the general principles, highlighted in the South African Constitutional Court's decision in National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre, *that should be observed.*

(3) Write an essay in which you summarise the basic features of the jurisdictional laws governing the specialist regimes of the sea, outer-space and Antarctica.

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The following works are hereby acknowledged as having been consulted and relied upon in the compilation of this guide:

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